

PROPERTY OUTLAWS

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Most people do not hold those who intentionally flout property laws in particularly high regard. The overriding negative view of the property lawbreaker as a “wrongdoer” comports with the status of property rights within our characteristically individualist, capitalist, political culture. This reflexively dim view of property lawbreakers is also shared, to a large degree, by property theorists, many of whom regard property rights as a relatively fixed constellation of entitlements that collectively produce stability and efficiency through an orderly system of ownership. In this Article, Professors Peñalver and Katyal seek partially to rehabilitate the reviled character of the intentional property lawbreaker, and to show how property outlaws have played an important role in the evolution and transfer of property entitlements. The authors develop a typology of the property outlaw by distinguishing between “acquisitive” and “expressive” outlaws. They show that both types of property outlaw have enabled the reevaluation of, and, at times, productive shifts in, the distribution or content of property entitlements. What emerges from this study is a vision of property law that looks beyond its capacity for fostering order and stability, focusing instead on its dynamic function as a site for the resolution of conflict between owners and nonowners. The authors argue that, if property is to perform this function, the law should be careful not to overdeter nonviolent refusals to abide by existing property arrangements.

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INTRODUCTION

The image most of us have of the person who intentionally flouts property laws is not particularly favorable. The *Oxford English Dictionary*, for example, defines a trespasser as a “transgressor, a law-breaker; a wrong-doer, sinner, offender.”¹ In early modern England, landowners frequently left “man traps” and “spring guns” along boundary lines to discourage trespass on their lands.² Such violent measures were not prohibited by law until the nineteenth century.³ And in rural areas of the United States, it is not uncommon to come across signs warning that “Trespassers Will Be Shot.”⁴ The overriding negative view of property lawbreakers in popular consciousness comports with the centrality of property rights within our characteristically individualist, capitalist, political culture.⁵

The dim view of property lawbreakers is shared to a large degree by property theorists, many of whom tend to focus on the stabilizing role of property law. The importance attached to exclusivity within contemporary theories of property underscores the apparent threat to order and stability posed by property lawbreakers. Many courts and commentators have placed this right at the center of their concept of private ownership.⁶ And for those who conceive of “property as exit,”

¹ XI THE OXFORD ENGLISH DICTIONARY 328 (1961).

² See TOM STEPHENSON, FORBIDDEN LAND: THE STRUGGLE FOR ACCESS TO MOUNTAIN AND MOORLAND 89 (Ann Holt ed., 1989) (discussing the use and dangers of these devices); see also *Ilott v. Wilkes*, (1820) 106 Eng. Rep. 674, 676-77 (K.B.) (deciding a case arising out of injuries inflicted on a trespasser by a property owner’s spring gun).

³ See Spring Guns and Man Traps Act, 1828, 7 & 8 Geo. 4, c. 18, § 12 (Eng.).

⁴ See, e.g., Michelle Jones, *Trespassers Will Be Shot, and More Family Fun*, Blessings for Life (2001), <http://blessingsforlife.com/southernliving/trespassers.htm> (telling of a family’s road trip to a mountain lake, where they observed such a sign).

⁵ See, e.g., Karl Marx, *On the Jewish Question*, in THE MARX-ENGELS READER 26, 42 (Robert C. Tucker ed., 2d ed. 1978); see also MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 18-20 (1991) (discussing the illusion of absoluteness in property rights and how that illusion illuminates political theory in the U.S.).

⁶ See *Lingle v. Chevron USA Inc.*, 544 U.S. 528, 539 (2005) (describing the right to exclude as “perhaps the most fundamental of all property interests”); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (“The power to exclude has traditionally been considered one of the most treasured strands in an owner’s bundle of property rights.”); see also Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 970-74 (2000) (discussing the idea of “exclusion” as “the hallmark of property”).

the right to exclude plays a crucial role in safeguarding individual liberty, the security of which is a vital function of private ownership.⁷

As Abraham Bell and Gideon Parchomovsky have correctly argued, one key purpose of property law is to provide stability, both for owners and for those who would engage in transactions with them.⁸ Property law achieves this stability in a variety of ways. One crucial way is through the criminal enforcement of existing property entitlements. Laws of criminal trespass protect the boundaries around real property established through market transactions. Laws prohibiting larceny, fraud, robbery, and burglary similarly wrap privately determined entitlements within the safety of the publicly enforced criminal law.

In this Article, we supplement the focus on the importance of property's stability by highlighting the powerful, and at times ironic, role of the lawbreaker in the process of fostering the evolution of property. Put another way, the apparent stability and order that property law provides owe much to the destabilizing role of the lawbreaker, who occasionally forces shifts of entitlements and laws. A more balanced portrayal of the lawbreaker offers us a richer and much more accurate picture of the dynamics behind the evolution of property entitlements and the forces that generate them. Our goal in this Article is therefore to rehabilitate, at least to a certain extent, the image of the intentional property outlaw, and to show how these lawbreakers have played integral roles in producing a system of property that is characterized by a complex and subtle contradiction: it is at once stable, perhaps even essentially so, and yet this seemingly ordered system at the same time masks a pervasive, but constructive, instability that is necessary to prevent the entire edifice from becoming outdated.⁹

⁷ See Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1891-92 (2005) (describing the conception of "property as exit" as of the idea that liberty is secured by "a person's ability to retreat into privately owned space").

⁸ See Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 552 (2005) ("[T]he benefits provided by property systems increase with the stability of the property rights they create.").

⁹ Cf. LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* 143 (2003) (describing property as a tool for "the resolution of conflicting claims and conflicting desires for what are often external, physical, finite goods"); Nicholas Blomley, *Law, Property, and the Geography of Violence: The Frontier, the Survey, and the Grid*, 93 ANNALS OF THE ASS'N OF AM. GEOGRAPHERS 121, 126-33 (2003) (discussing property as a locus of repeated violence and resolution).

This dialogic vision of property law parallels in many ways recent discussions within constitutional theory that have privileged a popular, bottom-up conception of lawmaking over the more traditional focus on official organs of lawmaking. Larry Kramer, for example, describes the important role played by lawbreaking and mob action in the early Republic's popular constitutional legal culture.¹⁰ The use of such tactics, however, extends far beyond the realm of constitutional law.

Our task is made easier by the fact that, despite the broadly negative view of property lawbreakers that prevails among lawyers and laypeople alike, property outlaws have repeatedly played a powerful and visible role as catalysts for needed legal change. Time and again, groups of people have intentionally violated property laws, and in a number of important instances, property law has responded by shifting to accommodate their demands, bringing them back within the fold of the law-abiding community. From the squatters and adverse possessors of the nineteenth-century American frontier, to the Native American and civil rights protesters of the 1960s, to the urban squatters of the 1970s and 1980s, those disenfranchised by the existing property system have frequently flouted the law in hopes of achieving their goals. Whatever one thinks about the merits of their positions, there can be no doubt that the activities of these property outlaws have been important engines for legal change.

Yet the useful role repeatedly played by lawbreakers in forcing needed reform within the property system has been mostly ignored by property theorists. The failure is attributable, at least in part, to a larger tendency among scholars to focus most of their attention on questions about the conditions conducive to the initial emergence of private ownership regimes, either from systems of commons property or from open-access systems.¹¹ In addition, a number of scholars have explored the roles of norms and private ordering in the informal adjustment of formal property entitlements.¹²

¹⁰ See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 27 (2004) (discussing mob action as "an accepted . . . form of political action").

¹¹ See, e.g., Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 354 (1967); Richard A. Epstein, *The Allocation of the Commons: Parking on Public Roads*, 31 J. LEGAL STUD. S515, S516 (2002); Katrina Miriam Wyman, *From Fur to Fish: Reconsidering the Evolution of Private Property*, 80 N.Y.U. L. REV. 117, 129 (2005).

¹² See, e.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* vii (1991) ("[P]eople frequently resolve their disputes in cooperative fashion without paying any attention to the laws that apply to those disputes.").

Property theorists have paid less attention, however, to the equally interesting question of how formal regimes of private ownership evolve from one particular bundle of ownership rights to another.¹³ And yet there can be no doubt that, once a robust system of private property has been established, the precise content of that standard bundle of property rights shifts over time in response to varying pressures and incentives, both internal and external to the institution of ownership. Indeed, a focus on the mechanisms of legal evolution within existing private property regimes is all the more important and interesting in an advanced capitalist society like ours, where, for large swaths of resources, the nearly complete “enclosure” of the commons and of open-access resources already has been accomplished.¹⁴

Some scholars discussing the question of evolution within common law regimes more generally have, quite reasonably, focused on incentives to litigate as an explanation for patterns of change within the law.¹⁵ Others have focused on the means by which interest groups band together to influence legislative legal change, both in the arena of property and elsewhere.¹⁶ But these officially sanctioned mechanisms of legal change offer us only part of the picture, particularly within the law of property.

Certain categories of nonowners are likely to be reluctant, or simply financially unable, to initiate costly civil litigation or to assert effective political pressure to clarify their entitlements. Intentional law-breaking as a mechanism for legal change is, almost by definition, then, a strategy employed by those who cannot afford to file civil suits or whose voice in the legislative process is too weak to attract the attention of lawmakers and thus unable to wrest a change in property

¹³ This point is related to, but slightly different from, Stuart Banner’s observation that scholars have not focused enough attention on precise mechanisms by which one property regime evolves into another. See Stuart Banner, *Transitions Between Property Regimes*, 31 J. LEGAL STUD. S359, S359-60 (2002). Of course, what is true for the regime shifts Banner describes is even more applicable to more modest transitions within existing regimes.

¹⁴ See generally James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, L. & CONTEMP. PROBS., Winter-Spring 2003, at 33.

¹⁵ See, e.g., George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65, 72 (1977) (“The tendency toward efficiency is a function of the common law process according to which legal rules are generated from the investment in litigation by individual parties . . .”).

¹⁶ See, e.g., Banner, *supra* note 13, at S368-69 (discussing the role of oligarchies in pushing through changes in property regimes); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 784, 818-24 (1995) (describing an interest group theory of takings law).

relations from existing entitlements.¹⁷ In other words, intentional lawbreaking is a tool of the little people—of the “have-nots.” In many cases, as we shall show, an initial transgression of a property entitlement is an essential event in provoking a shift in the law. It should therefore come as no surprise that some of the most significant judicial opinions in the common law development of property have come from the criminal side of the docket.¹⁸ Alternatively, protracted lawbreaking, as in the case of civil rights protesters of the 1960s, may catalyze a favorable legal response by shifting public opinion and inviting legislative intervention on the lawbreakers’ behalf. Given its appeal to the powerless and marginal, it is unsurprising that many of the stories of property change on which we focus have an undercurrent of concern about distributive justice.

This Article does not pretend to provide a general theory of shifts in legal regimes, or even in property law. Instead, we hope to explore just one facet of this larger issue by focusing on intentional lawbreaking as a mechanism that, time and again, has played a key role in fostering both symbolic and substantive evolution within the law of private ownership. In so doing, we hope to draw increased attention both to the general question of legal change within property law regimes and, in particular, to the frequently dialogic function performed by outlaws within that process.

Recognizing this recurrent cycle of productive lawbreaking and legal reform yields a variety of interesting conceptual, descriptive, and normative conclusions. To the extent that those on the outside of the property system frequently bring about a change in the content of property rights by flouting established property rules, the story we tell in this Article offers a view of property law as a dynamic institution that is broadly reflective of evolving community values, as opposed to a fixed set of entitlements rooted in abstract moral and economic theory. Our discussion therefore contributes to the growing body of literature emphasizing the dialogic and social nature of property law and eschewing the frequently static, individualist conception of property rights favored by libertarians and their sympathizers.¹⁹ More

¹⁷ See Eric Kades, *The Law & Economics of Civil Disobedience* 20-21 (2005) (unpublished manuscript, on file with authors).

¹⁸ See, e.g., *State v. Shack*, 277 A.2d 369, 374-75 (N.J. 1971) (finding no trespass by two individuals who entered a farmer’s private property to aid migrant farm workers living on the farm and employed by the owner).

¹⁹ See, e.g., GREGORY S. ALEXANDER, *COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970*, at 1 (1997); ERIC T.

normatively, however, we argue that lawbreakers have repeatedly played integral roles in spurring the evolution of property law. Telling their stories argues in favor of a careful consideration of the ways in which legal processes can be shaped to isolate the productive contributions of property outlaws from their less desirable effects.

In Part I, we elaborate on two broad categories of intentional lawbreaking that are particularly relevant to our analysis. For ease of discussion, we posit that intentional lawbreakers fall somewhere along a continuum of motivations, ranging from self-regarding, appropriative violations of property rights on one end, to more other-regarding, expressive violations of property rights on the other. Based on this observation, we offer two broad categories of description: “expressive” and “acquisitive” lawbreaking.

“Expressive” lawbreaking, which corresponds loosely—though imperfectly—to the category traditionally called civil disobedience,²⁰ seeks to send a strong message about the perceived injustice of existing property arrangements. “Acquisitive” lawbreaking, in contrast, involves actions that are oriented primarily toward direct appropriation. Here, the dominant motivating factor might be to gain immediate access or procure a certain good, as opposed to making a general statement about the appropriate scope of property rights in such instances. The key difference between the expressive and acquisitive categories is the distinction between intentional lawbreaking that generates immediate and substantial benefits for the lawbreaker and intentional lawbreaking that generates no such *immediate* benefits but that instead self-consciously aims at achieving (or generating support for) a larger legal goal. Of course, in drawing this distinction, we recognize that self-interest and expression often can seem like inseparable halves of the same whole; nevertheless, we think it is appropriate to draw some descriptive and normative distinctions between the two, recognizing, of course, the need for caveats and the presence of borderline cases.

FREYFOGLE, *THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD* 7 (2003); JOSEPH WILLIAM SINGER, *ENTITLEMENT: THE PARADOXES OF PROPERTY* 11 (2000); Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1, 7 (1989); Jennifer Nedelsky, *Reconceiving Autonomy*, 1 YALE J.L. & FEMINISM 7 (1989); Laura S. Underkuffler-Freund, *Response, Property: A Special Right*, 71 NOTRE DAME L. REV. 1033, 1034 (1996); Andre J. Van der Walt, *Property Rights and Hierarchies of Power: A Critical Evaluation of Land Reform Policy in South Africa* § 1.4 (2006) (unpublished manuscript, on file with authors).

²⁰ We do not use the term “civil disobedience” so as to avoid any confusion about the broader scope of our discussion, which encompasses lawbreaking activity that would not normally be understood as civil disobedience.

For this reason, the pervasive admixture of these two primary motivations suggests a hybrid category: “intersectional” lawbreaking, which occurs when movements extensively commingle both acquisitive and expressive activities.

In the course of describing specific historical instances in which these categories of property lawbreaking have been put to use in the service of change within the law of property, we also discuss the different ways in which the guardians of the status quo have responded to property outlaws by reaffirming, but sometimes by altering, various areas of property law. In some cases, lawbreakers have succeeded in shifting property laws in their favor. In others, the law has rebuffed their efforts. But no matter the outcome, lawbreakers’ concerted efforts have provided both citizens and lawmakers, in the legislature and the judiciary, with valuable opportunities to reconsider and deliberate the underlying justice of existing property arrangements.

In Part II, we step back for a moment to ask why it is worth focusing on the law of property in our discussion of outlaw tactics for legal change. We argue that, despite the generalized nature of lawbreaking as a tool for reform, there are reasons to think that such behavior will play a particularly important role in the evolution of property. Property law has a greater tendency than many other areas of law to become ossified and out of date, and it therefore has a greater need for occasional “shocks” to the system. While we do not dispute the value of stability in property entitlements, both for the individual and for the market as a whole, the survival of this system depends on its ability to respond dynamically. At such moments, property outlaws have played a crucial role, time and again, in drawing attention to the need for reform. As we show, property outlaws offer two important sources of value. First, they can sometimes contribute to efficient or justified forced transfers of entitlements, generating what we will call “redistributive value.” Second, protracted and pervasive property lawbreaking produces important data about the location of possible injustice or inefficiency within the property status quo, generating what we will call “informational value.”

In Part III, we offer a series of suggestions concerning how the law should respond to property outlaws. Drawing on both deterrent and retributive theories of punishment, we argue, at the most general level, that in light of the importance of property outlaws to the evolution of property doctrine, the state’s response to outlaws should be structured in specific ways to ensure that people are not overdeterred from (or unjustly punished for) challenging the existing property re-

gime. As we show, advances in the technology of property rights enforcement have the potential to reduce the expected rewards of property lawbreaking so greatly that the redistributive and informational value that might be generated by property outlaws is entirely lost. We therefore propose a set of policy responses that lawmakers and law enforcers can use to balance property's dual role as a source of stability and a locus of recurrent conflict, and to preserve space for the possibility of productive forms of lawbreaking, while discouraging its more destructive forms.

I. PROPERTY OUTLAWS

On November 20, 1969, in the early morning hours, a group of eighty-nine Native American activists landed on the federally abandoned property of Alcatraz Island in San Francisco Bay.²¹ They claimed the land "by right of discovery" and also under the terms of the Treaty of Fort Laramie, signed in 1868, which gave Native Americans the right to unused federal government property that had previously been theirs.²² Their occupation became the longest Indian occupation of any federal facility, until the federal government forcibly removed fifteen remaining protesters nineteen months later.²³ Although the occupation did not result in a shift of title, it sparked a massive movement among Native Americans that focused on the tactic of property occupations to draw attention to Native American claims concerning property and discrimination. From 1969 to the late 1970s, Native American activists carried out seventy-four occupations of property, including the Trail of Broken Treaties, the occupation of the Bureau of Indian Affairs (BIA) headquarters in 1972, and Wounded Knee II in 1973.²⁴

The actual number of property outlaw movements, both in the United States and abroad, is truly astonishing. Countless groups, both well known and obscure, have resorted to illegal tactics to achieve their property goals. In a number of cases they have been successful, obtaining for their participants the desired access, possession, or even title of property. Whether they fail or succeed, outlaws reveal an es-

²¹ Troy Johnson et al., *American Indian Activism and Transformation: Lessons from Alcatraz*, in *AMERICAN INDIAN ACTIVISM: ALCATRAZ TO THE LONGEST WALK* 9, 27 (Troy Johnson et al. eds., 1997).

²² *Id.*

²³ *Id.* at 29-30.

²⁴ *Id.* at 32-33.

sential ambiguity at the core of property law: for the people occupying Alcatraz, property was both the object and the subject of their disobedience—the instrumental tool upon which the protest was based as well as the proverbial “brass ring” they hoped to gain in the unlikely event that their actions succeeded. Just as property law aims to enhance social stability by establishing a system of clear and fixed rules with respect to ownership, it also crucially motivates cultural and political forces that seek to contest and destabilize the status quo, creating chaos and confusion in the midst of seeming orderliness.

Not all outlaw movements, however, are created equal in terms of their scope, aims, or effectiveness. In this Part, we introduce three stories of property lawbreakers to emphasize the varying aims and interests of property outlaws. These examples are not meant to be exhaustive, or even representative, of the sheer variety of property lawbreakers that exist. Rather, they simply are meant to serve as illustrations of one possible typology of the disobedience that frequently reappears within the history of property law.

We divide lawbreakers into two primary categories, reflecting differences in their goals and motivations. *Acquisitive* outlaws seek to obtain for themselves ownership of some property interest presently in the hands of another, whether that owner be the government or a private party. *Expressive* outlaws are not interested in obtaining property for themselves, but rather are concerned with influencing the ways in which current owners use or enjoy their property rights. The latter often operate by refusing to give effect to the owner’s attempt to make the particular use of the property to which the expressive outlaw objects. But their goal normally extends beyond the individual owner and includes a desire to communicate with the polity as a whole in order to bring about systematic change in the content of ownership rights. Because many outlaw movements actually represent a complex mixture of motives, we also discuss the hybrid category of *intersectional* outlaws.

A. *Acquisitive Outlaws: Squatters and Adverse Possessors in the American West*

1. Land for Revenue Versus Land for Settlers

The history of land law in the nineteenth-century American West is, in part, one of protracted conflict between those who held legal title—whether Native American tribes, the federal government, or private land speculators—and white settlers who resided on the land, of-

ten without any formal legal entitlement. This story is well known and has been ably narrated by a series of historians.²⁵ Our goal in this subsection therefore will not be a comprehensive retelling. Instead, we hope simply to bring out the ways in which this struggle replicates a pattern of legal change instigated by property outlaws, one that that has been repeated in a variety of guises.

In this particular case, settlers created the impetus for legal change by running roughshod over established property laws, thereby creating for themselves communities governed by their own conception of just, albeit self-serving, property relations. Although their actions were initially met with condemnation by the legal establishment, their persistent lawbreaking ultimately paid off. Over the course of the nineteenth century, the law slowly but surely adapted itself to the reality the settlers had created on the ground.

The nineteenth-century conflict between settlers and owners played out within the context of a larger policy debate between competing visions of how to dispose of the vast western territories acquired by the United States. By 1803, more than ninety percent of the nation's territory consisted of sparsely populated, wild lands, with large (and increasing) quantities under public ownership.²⁶ Virtually all involved in the discussion agreed that the ultimate goal of government policy should be to expeditiously transfer public lands to private ownership and to encourage settlement of what was, from the perspective of everyone but Native Americans,²⁷ an unoccupied and unexploited continent.²⁸ Despite these shared long-term goals, policymakers disagreed over whether public lands should be used as a source of revenue to help pay off the national debt, or as a reservoir of public lar-

²⁵ For an extremely comprehensive account of the history of public land law, see PAUL W. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* (photo. reprint 1979) (1968).

²⁶ John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816, 843-44 (1994).

²⁷ While the squatters vociferously defended their claims to the land, often in starkly moral terms, *see infra* note 32 and accompanying text, they felt no obligation to respect Native American title. *See infra* note 199 and accompanying text.

²⁸ *See* Mary E. Young, *Congress Looks West: Liberal Ideology and Public Land Policy in the Nineteenth Century*, in *THE FRONTIER IN AMERICAN DEVELOPMENT: ESSAYS IN HONOR OF PAUL WALLACE GATES* 74, 110 (David M. Ellis ed., 1969) (describing the "liberal consensus," which believed that the assignment of public property into private property was critical to national welfare).

gess with which to create a nation of Jeffersonian small-holding property owners.²⁹

Policymakers who wanted to use public lands to generate revenue typically preferred to auction off public lands to speculators at relatively high prices, with the understanding that the speculators, in turn, would divide the property into smaller parcels, which they would sell to settlers or lease to tenants for a profit.³⁰ Policymakers who favored direct distribution of public lands to settlers justified their views in republican terms, extolling the virtues of a nation of small property owners and warning of the consequences of widespread tenancy and concentrated, absentee ownership. They therefore argued for the direct sale of public land to actual settlers at low, fixed prices or, even better, the free distribution of land to those willing to work it.³¹

Unsurprisingly, the sympathies of the settlers themselves were with the latter camp. Although their judgment no doubt was influenced by their own substantial financial interest in the outcome of the policy debates, settlers and their supporters tended to frame their views in strongly moral terms. Every citizen, they argued, is entitled to own land, and the claims of those who actually work the land should take precedence over the fungible interests of absentee land speculators.³² Settlers therefore demanded that the government recognize a right of “preemption,” which would entitle squatters on public land to purchase the land they improved at low, fixed prices, or, at a minimum, to obtain the value of their improvements from those who purchased the land at auction.³³

The center of national power was firmly planted in the already settled lands of the east. Consequently, the views of western settlers initially took a back seat to those who favored using public land to raise

²⁹ See GATES, *supra* note 25, at 145 (describing the ultimate decision to sell public lands at high prices to pay off the debt, rather than at low prices to facilitate the settling of pioneers with low capital).

³⁰ See *id.*

³¹ See *id.* at 170-71.

³² See DANIEL FELLER, *THE PUBLIC LANDS IN JACKSONIAN POLITICS* 77 (1984) (quoting an activist’s famous claim that “the land belongs to the people”); GATES, *supra* note 25, at 170; Young, *supra* note 28, at 79 (explaining the theory that only settlers’ labor gives land value). In his examination of the origins of frontier water laws, David Schorr has found a similar resort to moral claims. See David B. Schorr, *Appropriation as Agrarianism: Distributive Justice in the Creation of Property Rights*, 32 *ECOLOGICAL L.Q.* 3, 25-33 (2005) (tracing Colorado water laws to Jacksonian populism and a moral emphasis on production).

³³ See GATES, *supra* note 25, at 219.

revenue.³⁴ Late eighteenth- and early nineteenth-century land law, for the most part, provided for the sale of public lands at auction with relatively high minimum prices and large minimum tract sizes.³⁵

In order to make public lands as attractive as possible to those bidding in the auctions, the federal government attempted to keep squatters off of public lands in advance of the sale. To that end, Congress enacted a series of laws criminalizing intrusion by settlers onto federally owned land.³⁶ From time to time, the military was called in to remove squatters from federal lands.³⁷ Despite all of this, settlers persisted in trespassing onto and improving government land.³⁸

Faced with an official policy of hostility toward their presence and an inability to purchase land at an affordable price, squatters turned toward extralegal means to obtain the land they occupied. They organized themselves into "settlers' associations," which served as quasi-governments that squatters employed to protect their interests, both by lobbying state and federal governments and by threatening retribution against those who attempted to take title to squatter-occupied lands.³⁹ When things got out of hand, squatters could count on their friends and neighbors on the local jury to acquit them.⁴⁰ Groups of settlers attended land auctions in order to intimidate speculators' agents from bidding on squatter-occupied land.⁴¹ Using these tactics, settlers were typically able to achieve what amounted to a *de facto* preemption right by "flouting [f]ederal law" that mandated competitive bidding.⁴²

³⁴ See *id.* at 122.

³⁵ See *id.* at 122-31.

³⁶ In March 1804, Congress enacted a statute authorizing the army to forcibly eject squatters from public lands and imposing severe fines and even imprisonment on them. Act of Mar. 26, 1804, ch. 38, § 14, 2 Stat. 283, 289. In 1807, as the squatter problem continued unabated, Congress made the penalties even more severe. See Act of Mar. 3, 1807, ch. 46, 2 Stat. 445-46.

³⁷ See GATES, *supra* note 25, at 122.

³⁸ See *id.*

³⁹ See *id.* at 145-56; see also RICHARD WHITE, "IT'S YOUR MISFORTUNE AND NONE OF MY OWN": A HISTORY OF THE AMERICAN WEST 140-42 (1991) (explaining how farmers formed "claims clubs" and cooperated to protect their rights against speculators or "claim jumpers").

⁴⁰ See GATES, *supra* note 25, at 154.

⁴¹ See WHITE, *supra* note 39, at 140-42.

⁴² GATES, *supra* note 25, at 161, 164; see also WHITE, *supra* note 39, at 141-42 ("Such extralegal modifications changed the [land] system more effectively than legal changes could have done.").

2. Legal Responses

Eastern politicians condemned the squatters' lawless "usurpation" of public lands and the "system of terror" . . . 'plunder, and perfidy' they carried out in the face of Congress's will.⁴³ They accused squatters of being "greedy, lawless land grabbers who had no respect for law, order, absentee ownership of property, and Indian rights."⁴⁴ President James Madison issued a proclamation warning "uninformed or evil-disposed persons . . . who have unlawfully taken possession of or made any settlement on the public lands . . . forthwith to remove therefrom' or face ejection by the army and prosecution for trespass."⁴⁵ And Henry Clay dismissed the squatters as a "lawless rabble."⁴⁶

The dim view of squatters held by the eastern establishment was not shared by residents of the West. Western public opinion, among squatters and nonsquatters alike, favored squatters over absentee landlords, public and private.⁴⁷ Western residents voiced three broad objections to land speculators: (1) speculators paid their local property taxes grudgingly, if at all; (2) they urged their agents to resist local public expenditures, no matter how necessary; and (3) they failed to improve their land, preferring to wait until the improvements made by others enhanced the value of their own property.⁴⁸ This parasitic strategy meant that, in areas where large tracts of land were held by speculators, settlement and development were hindered, producing what one observer at the time referred to as a "speculators' desert."⁴⁹

Over time, squatters were able to leverage their support within settler communities to obtain the legal changes they demanded. In part, this victory grew out of the sympathy that local residents and officials

⁴³ GATES, *supra* note 25, at 161, 164 (quoting statements by opponents of preemption).

⁴⁴ *Id.* at 223.

⁴⁵ FELLER, *supra* note 32, at 17 (quoting Madison's proclamation, issued in December 1815) (alterations in original).

⁴⁶ GATES, *supra* note 25, at 233 (quoting CONG. GLOBE, 25th Cong., 1st Sess. 142, 142-43 (1848)).

⁴⁷ See 8 REG. DEB. 2259, 2268-71 (1832).

⁴⁸ GATES, *supra* note 25, at 173; see also Henry Cohen, *Vicissitudes of an Absentee Landlord: A Case Study*, in THE FRONTIER IN AMERICAN DEVELOPMENT, *supra* note 28, at 192, 215 (giving an example of an absentee landlord who made no contribution to developing the region).

⁴⁹ Letter from Jane Grey Swisshelm to the St. Cloud Democrat (Apr. 3, 1862), in CRUSADER AND FEMINIST: LETTERS OF JANE GREY SWISSELM: 1858-1865, at 153 (Arthur J. Larsen ed., 1934).

had for the squatters and the ability of those officials to use local property laws to undermine the federal policy. It also reflected the general helplessness of the federal government in the face of a concerted refusal to obey the law. Failure by federal officials to recognize the reality of squatters' power on the ground threatened to undermine general respect for law on the frontier.⁵⁰ Ultimately, then, settlers' continued refusal to recognize the rights of absentee owners rendered the federal government's pro-speculator stance untenable.

Although local governments could not directly counter the federal policy of selling public lands to absentee speculators, they could support squatters by adapting local laws in ways that made it easier for squatters to dispossess private absentee owners. According to historian Henry Cohen, "[a] kind of guerrilla warfare against absentee landlords was endemic in the West."⁵¹ For example, local governments raised taxes on land to make it expensive for absentee landlords to hold land idle while they waited for land values to increase.⁵² Local law also often required payment of taxes in specie while permitting rent to be paid in depreciated paper currency.⁵³ High taxes also made it relatively easy for local residents to obtain tax titles on absentee-owned property.⁵⁴ This was particularly true when, as sometimes happened, local officials refused to accept tax payments from the agents of absentee owners.⁵⁵ Combined with liberalized adverse possession statutes that shortened periods for transferring title and granted even more favorable treatment to those claiming under color of title, tax titles constituted a powerful tool in the hands of squatters on private land.⁵⁶

State courts likewise may have pitched in on behalf of squatters.⁵⁷ As several scholars have observed, over the course of the nineteenth century, state property law was transformed by courts in ways that favored the actual occupants of land over absentee owners.⁵⁸ John

⁵⁰ See GATES, *supra* note 25, at 235 (noting that "[r]espect for the law was declining").

⁵¹ Cohen, *supra* note 48, at 202.

⁵² See *id.* at 204-05.

⁵³ See *id.*

⁵⁴ See *id.* at 202; see also GATES, *supra* note 25, at 267.

⁵⁵ See GATES, *supra* note 25, at 267.

⁵⁶ See Cohen, *supra* note 48, at 201; see also GATES, *supra* note 25, at 267-68.

⁵⁷ See Cohen, *supra* note 48, at 203 (noting that absentee owners took great care "to stay out of state courts," which often sympathized with local settlers).

⁵⁸ See, e.g., MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 32-34 (Oxford Univ. Press 1992) (1977) ("[P]riority [of development] became

Sprankling has, in a series of articles, documented the variety of ways in which nineteenth-century courts modified the common law in order to encourage intensive uses of wild lands, uses that invariably favored local residents over distant speculators.⁵⁹ Most significantly, in the context of adverse possession, Sprankling argues, courts loosened the requirements for the intensity of the activity on the basis of which possessors could assert ownership. As applied to wilderness land, these changes eviscerated the requirement that the possessor's activity be sufficiently permanent and visible so as to put the true owner on notice that someone else was making use of his property.⁶⁰

The liberalized approach to adverse possession was a valuable legal weapon in the hands of squatters in the nineteenth-century American West, particularly because the American law of adverse possession has not traditionally inquired into the good faith of adverse possessors.⁶¹ Indeed, when jurisdictions have deviated from this gen-

the dominant doctrine of property law in the early stages of American economic growth.”); Sprankling, *supra* note 26, at 844 (explaining that a shift in the American courts from formalism to instrumentalism emphasized land development).

⁵⁹ See John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519, 523 (1996) (proposing that nineteenth-century judges sought to fashion property law in a way that would “encourage national development”); Sprankling, *supra* note 26, at 816 (arguing that the modern doctrine of adverse possession evolved as part of “a prodevelopment nineteenth century ideology that encourages and legitimates economic exploitation”); see also Schorr, *supra* note 32, at 25-26 (arguing that nineteenth-century Colorado law was designed to favor the “actual settler” over “absentee speculators and corporations controlled by eastern and European investors”).

⁶⁰ Sprankling, *supra* note 59, at 538-40. See generally Sprankling, *supra* note 26 (elaborating on his thesis about adverse possession).

⁶¹ See, e.g., 3 AMERICAN LAW OF PROPERTY § 15.1, at 755 (1952) (reviewing the origin and history of adverse possession law); Percy Bordwell, *Disseisin and Adverse Possession*, 33 YALE L.J. 1, 10 n.78 (1923) (observing that the majority position among U.S. jurisdictions is not to require good faith on the part of the adverse possessor). This point has no bearing on, and is not affected by, the well-known debate between R.H. Helmholz and Roger Cunningham over the significance of good faith in modern adverse possession caselaw. See R.H. Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U. L.Q. 331, 331-32 (1983) (arguing that, in contrast to the dominant view that “[i]t matters not what the motives or the state of mind of the possessor are,” the caselaw “clearly show[s] that the trespasser who knows he is trespassing . . . is less likely to acquire title” than the good faith adverse possessor); Roger A. Cunningham, *Adverse Possession and Subjective Intent: A Reply to Professor Helmholz*, 64 WASH. U. L.Q. 1, 58 (1986) (arguing that “there is no tenable basis for [Professor Helmholz’s] broad conclusion” that caselaw consistently considers “the ‘good faith’ or ‘bad faith’ of the adverse claimant”); R.H. Helmholz, *More on Subjective Intent: A Response to Professor Cunningham*, 64 WASH. U. L.Q. 65 *passim* (1986) (responding to, and disputing, Professor Cunningham’s claims).

Even if Helmholz is correct that subjective intent has become a relevant inquiry in adverse possession cases, he limits his claims to “recent cases,” published between 1966

eral stance, they often have done so to *require* that the adverse possessor act in bad faith—that is, with the knowledge that the land she occupies is not her own. This counterintuitive approach, embodied in the so-called “Maine Rule,” at one time enjoyed “considerable support,” but has more recently fallen from grace.⁶² The rule strongly favors squatters over other sorts of untitled land users, a position that may have made it an attractive rule for Maine to adopt as it struggled with its own absentee owner problem and competed for settlers with the western frontier during the middle decades of the nineteenth century.⁶³

It is possible that the adoption of these and similar legal innovations favoring squatters explains why many easterners at the time regarded westerners as “having no respect for private property and as being ever ready to strain and distort the law to strike at nonresidents.”⁶⁴ Nevertheless, confronted with an utter inability to protect absentee owners or to enforce prohibitions against squatting on federal land, the federal government slowly but surely began to alter its policies over the middle decades of the nineteenth century, moving away from the use of public land for revenue and toward the direct distribution of land to actual settlers.

The first concessions to illegal squatters were a series of retroactive preemption laws passed repeatedly during the first half of the nineteenth century.⁶⁵ Perhaps more significantly, however, the tone of federal policy began to shift markedly under the Jacksonian presidencies of the 1830s. Jackson himself referred to “nonresident pro-

and 1983. Helmholtz, *Adverse Possession and Subjective Intent*, *supra*, at 333. Nothing in his analysis casts doubt on the accuracy of the scholarly consensus that the “older cases” unanimously agreed that the “‘claim of right’ [necessary for an adverse possessor to prevail] is equally efficacious whether it is asserted in ‘good faith’ or ‘bad faith.’” Cunningham, *supra*, at 23.

⁶² William Sternberg, *The Element of Hostility in Adverse Possession*, 6 TEMP. L.Q. 207, 213-14 (1932). The principal alternative to the Maine Rule was not a rule requiring that the adverse possessor occupy the land in good faith, but rather the so-called “Connecticut Rule,” which holds that the adverse possessor’s state of mind is irrelevant to the adverse possession inquiry. *Id.* at 214-15.

⁶³ See David C. Smith, *Maine and Its Public Domain: Land Disposal on the Northeastern Frontier*, in THE FRONTIER IN AMERICAN DEVELOPMENT, *supra* note 28, at 113, 114, 119-22 (describing Maine’s efforts to lure settlers to its northern frontier and the limiting effects of absentee ownership on its population growth).

⁶⁴ GATES, *supra* note 25, at 268.

⁶⁵ See, e.g., *id.* at 162 (observing that Congress enacted twenty-four special preemption acts before 1820 and fifteen between 1820 and 1837, all of which were retroactive in effect).

prietorship” as “one of the greatest obstacles to the advancement of a new country” and, in his 1836 Specie Circular, sought to deter speculation in federal lands by requiring payment for the purchase of those lands in specie only.⁶⁶ President Van Buren reaffirmed this shift in policy in his first annual message to Congress, when he observed that “selling [public] lands for the greatest possible sum of money, without regard to higher considerations,” was not the proper goal of federal land policy.⁶⁷

But the true victory for squatters came in 1841, when Congress enacted the first generally applicable and prospective preemption statute for surveyed federal lands.⁶⁸ In creating such a broad preemptive right, the federal government, in effect, abandoned its longstanding position that squatting on public lands was illegal and should be discouraged or punished. Over the subsequent years, the 1841 preemption statute was expanded to cover both surveyed and unsurveyed land.⁶⁹ The federal embrace of squatters’ rights reached its apogee with the 1862 Homestead Act, which provided for the free acquisition of federal land by those who met the statute’s five-year residency and improvement requirements.⁷⁰

The transformation of the image of squatters from the shameless lawbreakers and usurpers reviled by eastern elites into the revered pioneers of American mythology is nothing if not ironic. But the squatters’ influence on American land law is undeniable. Their persistent and acquisitive lawbreaking raised the political profile of conflicts over how to dispose of the massive quantities of public land acquired by the United States government during the first half of the nineteenth century, and it ultimately led to the resolution of the conflict in their favor.

⁶⁶ *Id.* at 175.

⁶⁷ Martin van Buren, State of the Union Address (Dec. 5, 1837), *available at* <http://www.thisnation.com/library/sotu/1837mvp.html>.

⁶⁸ See Act of Sept. 4, 1841, ch. 16, § 10, 5 Stat. 453, 455 (authorizing squatters “to enter with the register of the land office . . . any number of acres not exceeding one hundred and sixty . . . upon paying to the United States the minimum price”).

⁶⁹ See Act of June 2, 1862, ch. 94, § 1, 12 Stat. 413, 413 (providing that “when unsurveyed lands are claimed by preemption, notice of the specific tracts claimed shall be filed within six months after the survey has been made”).

⁷⁰ See Act of May 20, 1862, ch. 75, § 1, 12 Stat. 392, 392 (entitling squatters “to enter one quarter section or a less quantity of unappropriated public lands”).

B. *Expressive Outlaws: The Civil Rights Movement*

1. The Lunch Counter Sit-in Movement

Prior to the 1960s, the Civil Rights Movement was largely focused on achieving legal change through a sophisticated litigation program in the federal courts directed by the NAACP. John Lewis, who made his start in public life as a student leader of sit-ins in Nashville, characterized the NAACP-led strategy as relying on “a handful of lawyers [working] in a closed courtroom.”⁷¹ Students in Greensboro, North Carolina, however, dramatically shifted the focus of the movement when they began sitting in at segregated lunch counters in February 1960—protests that were quickly replicated by student groups across the South.⁷² Within weeks, students were trespassing at segregated lunch counters in copycat actions in nearly three dozen southern cities.⁷³ They were well organized, nonviolent, and persistent.⁷⁴

The sit-in movement falls squarely within our discussion of intentional property lawbreaking intended to bring about larger changes in existing property laws. Throughout the South, the segregation of privately owned places of public accommodation, such as the Wool-

⁷¹ JOHN LEWIS WITH MICHAEL D'ORSO, *WALKING WITH THE WIND: A MEMOIR OF THE MOVEMENT* 114 (1998); see also ROBERT WEISBROT, *FREEDOM BOUND: A HISTORY OF AMERICA'S CIVIL RIGHTS MOVEMENT* 37 (1990) (noting that “[s]ince its founding in 1910,” the NAACP and its “predominantly middle-class, professional leadership had fought its most protracted struggles in court chambers and congressional anterooms”).

⁷² The Greensboro sit-ins were not the first time intentional trespass had been employed in the Civil Rights Movement. Civil rights groups had experimented with the tactic a generation earlier. Clusters of sit-ins also had erupted during the 1950s, albeit without the national media attention that catapulted the Greensboro sit-ins to iconic status. See ALDON D. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE* 188-94 (1984) (“During the late 1950s activists associated with direct action organizations began experimenting with the sit-in tactic.”). The earlier sit-ins had established the property right of owners to exclude selectively on the basis of race. See, e.g., *Solicitor Says Race Incidents Unnecessary*, GREENSBORO DAILY NEWS, Feb. 10, 1960, at A4 (describing a 1957 sit-in at a North Carolina ice cream parlor). The Greensboro sit-ins were different both because of the national attention they received and because, as a consequence of that attention, they inspired countless sit-ins across the South in the weeks that followed. See, e.g., *First Sitdown Staged in Deep South*, GREENSBORO DAILY NEWS, Feb. 26, 1960, at A3; *Negroes' Protests Still Spreading*, GREENSBORO DAILY NEWS, Feb. 12, 1960, at A10.

⁷³ See JACK M. BLOOM, *CLASS, RACE, AND THE CIVIL RIGHTS MOVEMENT* 159 (1987) (“By the end of February [1960], thirty-two cities in North Carolina, South Carolina, Virginia, Tennessee, Florida, Maryland, Kentucky, and Alabama had experienced sit-ins and other demonstrations protesting racial restrictions.”).

⁷⁴ See LEWIS WITH D'ORSO, *supra* note 71, at 93-107 (describing the organization of the Nashville Student Movement).

worth's lunch counters targeted by the Greensboro students, was not accomplished by mandate of state or local law, as is sometimes suggested.⁷⁵ Instead, black patrons were excluded as a matter of local "custom," that is, through owners' private exercise of their common law property right to exclude.⁷⁶ By disobeying store owners' instructions to leave the premises, the black students participating in lunch-counter sit-ins were, like the squatters in the American West, intentionally disregarding the very property rights they sought to change.

That the sit-ins were primarily expressive can hardly be questioned. The goals of the sit-in participants would not have been satisfied had they simply been allowed to eat at the lunch counters where they were sitting, without larger changes prohibiting the maintenance of segregated lunch counters more generally. Instead, the sit-ins were aimed at achieving broad legal transformation of the social meaning of public accommodation, one that would permanently rearrange the property rights of all owners, for the benefit of *all* black citizens—whether or not they had participated in the sit-ins.

The expressive nature of the sit-ins is illustrated further by the symbolic force participants attributed to the act of lawbreaking itself. Many of the participants in the sit-ins spoke about the deep significance of their protests, independent of any legal change they might be instrumental in bringing about. One Greensboro demonstrator, for example, later said of the first day of the sit-ins: "I probably felt better that day than I've ever felt in my life. I felt as though I had gained my manhood"⁷⁷ Unsurprisingly, then, historians have described the protests in plainly expressive terms. William Chafe, for example, described the protests as "a new language."⁷⁸ "Moreover," he continued, "the language communicated a message different from that which had been heard before. A direct connection existed between style and content. In an almost visceral way, the sit-ins expressed the dissatisfaction and anger of the black community toward white indifference."⁷⁹

⁷⁵ See, e.g., MORRIS, *supra* note 72, at 197 ("In the South during the 1950s segregation laws prohibited blacks and whites from eating together.").

⁷⁶ See *Bell v. Maryland*, 378 U.S. 226, 271-78 (1964) (Douglas, J., concurring) (providing a review of cases where "the testimony of corporate officers shows that the reason [for segregation] was either a commercial one or, which amounts to the same thing, that service to Negroes was not in accord with local custom").

⁷⁷ WILLIAM H. CHAFE, *CIVILITIES & CIVIL RIGHTS: GREENSBORO, NORTH CAROLINA, AND THE BLACK STRUGGLE FOR FREEDOM* 116 (1980).

⁷⁸ *Id.* at 139.

⁷⁹ *Id.*

The initial reaction to the sit-ins among mainstream civil rights leaders and elites within the black community was largely one of disapproval. Some black professionals, put off by the protesters' disregard for the law—a tactic that they thought likely to prove counterproductive—were “slow to support the students.”⁸⁰ And the NAACP, which was, as a general matter, “hostile to mass action, and especially to breaking the law,” initially refused to support the sit-in movement.⁸¹ After hearing about the Greensboro sit-ins, Thurgood Marshall

stormed around the room proclaiming . . . that he did not care what anyone said, he was not going to represent a bunch of crazy colored students who violated the sacred property rights of white folks by going into their stores or lunch counters and refusing to leave when ordered to do so.⁸²

Reaction among many southern whites, who had long believed and insisted that southern blacks were content with the segregated status quo, was even more hostile. Governor Luther Hodges of North Carolina, for example, called the sit-ins “counterproductive and a threat to law and order.”⁸³ “I have no sympathy whatsoever,” he declared, “for any group of people who deliberately engage in activities which any reasonable person can see will result in a breakdown of law and order, as well as interference with the normal and proper operation of a private business.”⁸⁴ Governor Ernest F. Hollings of South Carolina lashed out at the protesters, who, he said, “think they can violate any law, especially if they have a Bible in their hands.”⁸⁵ Southern politicians denounced the sit-in protesters for their conduct on

⁸⁰ BLOOM, *supra* note 73, at 171.

⁸¹ *Id.* at 172; *see also* CHAFE, *supra* note 77, at 117 n.* (“The national NAACP criticized the sit-in tactic and refused legal or moral support for some time.”); MORRIS, *supra* note 72, at 198 (“The national office of the NAACP and many conservative ministers refused to back the Greensboro sit-ins.”).

⁸² Mary L. Dudziak, *Working Towards Democracy: Thurgood Marshall and the Constitution of Kenya*, 56 DUKE L.J. 721, 763-64 (2006) (quoting Derrick Bell, *An Epistolary Exploration for a Thurgood Marshall Biography*, 6 HARV. BLACKLETTER L.J. 51, 55 (1989)); *see also* Tomiko Brown-Nagin, *Seeking Redress in the Streets: The Student Movement’s Challenge to Pragmatism and Liberalism, 1960-1961*, at 9 (2006) (unpublished manuscript, on file with authors).

⁸³ CHAFE, *supra* note 77, at 120.

⁸⁴ Guy Munger, *Sit-In Protests Are Assailed by Governor*, GREENSBORO DAILY NEWS, Mar. 11, 1960, at A1.

⁸⁵ WEISBROT, *supra* note 71, at 24.

the floor of both the House⁸⁶ and the Senate.⁸⁷ In countless letters to the editor, southern whites deplored the sit-in participants as lawless violators of private property rights.⁸⁸ As one letter (characteristically) put it,

[t]hose who invaded private property in violation of the regulations of the owners are the violators of our oldest and most time-honored laws and should be dealt with as lawbreakers.

Those who want to make a protest against the regulations of the owners have a perfect right to do so, but such protests should be made through the proper channels and within the law.⁸⁹

White moderates in the South, while expressing sympathy with the protester's goals, likewise disapproved of their violation of property rights and called for protesters to express their grievances by less confrontational means.⁹⁰ The moderate *Greensboro Daily News*, for example, attempted to weave a middle path, disapproving of the sit-in participants' unlawful tactics while criticizing business owners who welcomed black shoppers throughout their stores only to exclude

⁸⁶ See, e.g., 106 CONG. REC. 4, 5211 (1960) (statement of Rep. Forrester, Ga.) ("These [sit-ins] have caused fights, riots, and near riots.").

⁸⁷ Senator McClellan, of Arkansas, argued that the sit-in demonstrators were "stirring up bad feeling and tension and hatred between the races," and he used their actions as a reason to oppose the proposed Civil Rights Act of 1960. 106 CONG. REC. 6, 7764 (1960).

⁸⁸ See, e.g., Eugene A. Hood, Letter to the Editor, *Police Protection*, GREENSBORO DAILY NEWS, Feb. 15, 1960, at A6 (condemning the Greensboro police for failing to enforce property rights in the face of sit-ins); W.N. Jefferies, Letter to the Editor, *It Is Disgusting*, GREENSBORO DAILY NEWS, Mar. 18, 1960, at A8 ("It is disgusting that the white citizens of the State of North Carolina will even consider 'negotiations' with these arrogant lawbreakers and trespassers who are ruining private businesses."); Letter to the Editor, *A Christian Movement?*, GREENSBORO DAILY NEWS, Feb. 17, 1960, at A8 (calling the sit-in participants "covetous[]," "selfish," and unchristian); Marian S. Patterson, Letter to the Editor, *Work of the Devil*, GREENSBORO DAILY NEWS, Feb. 22, 1960, at A4 (calling sit-in participants "rioters" and the sit-ins "the work of the devil"); Readsville Reader, Letter to the Editor, *Lost a Friend?*, GREENSBORO DAILY NEWS, Feb. 18, 1960, at A6 ("Those seeking equal rights at the lunch counter, in my opinion, went about it in a way of the belligerent.").

⁸⁹ T.W. Chandler, Letter to the Editor, *Un-American?*, GREENSBORO DAILY NEWS, Feb. 24, 1960, at A8; see also *id.* ("Those who show so much concern about the rights of the invaders of private property apparently have no concern whatsoever about the rights of those who own property, which to me is a strange, un-American and unchristian attitude.").

⁹⁰ See CHAFE, *supra* note 77, at 126.

them from sit-down lunchcounter service.⁹¹ “The right to private property is a precious one,” its editors said in an April 1960 editorial:

It ought not to be chipped away, even in what may be considered a righteous cause. Once weakened in one area, it becomes subject to attack in others, and precedents designed for good purposes may later be used for objectionable or evil ones. This newspaper has joined Governor Leroy Collins and other thoughtful Southerners in questioning the fairness of inviting the Negro into variety stores and soliciting his trade, and when he has bought his merchandise then declining to let him sit down on a stool for a cup of coffee. But we have also recognized, with the courts, that a private business has, and ought to have under our laws, the right to operate as it sees fit, in a discriminatory fashion or otherwise.⁹²

Former President Harry Truman, using more colorful language, concurred, observing that “[i]f anyone came into my store and tried to stop business, I’d throw him out. The Negro should behave himself and show he’s a good citizen.”⁹³ Asked about the protests during a news conference at the height of the sit-ins, President Eisenhower equivocated, saying that, while he sympathized “with the efforts of any group to enjoy the rights . . . of equality that they are guaranteed by the Constitution,” equality should be pursued only “in a perfectly legal way.”⁹⁴

2. Legal Responses

Hundreds of students who participated in the sit-ins were arrested and charged, typically with criminal trespass.⁹⁵ In some jurisdictions, such as Georgia and Virginia, where applicable criminal statutes did

⁹¹ See, e.g., MILES WOLFF, LUNCH AT THE FIVE AND TEN: THE GREENSBORO SIT-INS: A CONTEMPORARY HISTORY 82 (1970) (noting that “the editorial pages of [local papers] supported the students, although not without some reservations”); Editorial, *Of Civil Rights and Civilities*, GREENSBORO DAILY NEWS, Mar. 2, 1960, at A6 (“Somewhere a Southern community must find a way to deal with civilities as well as civil rights. Such an answer will not be found while the management is under the gun. It will be found only where both sides are able to sit down and work out an answer unimpeded by the threat of force or the worry of economic reprisal.”).

⁹² Editorial, *Lunch Counters and Private Property*, GREENSBORO DAILY NEWS, Apr. 23, 1960, at A6.

⁹³ WOLFF, *supra* note 91, at 115.

⁹⁴ *Transcript of Eisenhower’s News Conference on Domestic and Foreign Matters*, N.Y. TIMES, Mar. 17, 1960, at 16.

⁹⁵ See, e.g., *26 Sitdowners Given Suspended Sentences*, GREENSBORO DAILY NEWS, Apr. 5, 1960, at A5; *43 Students Convicted in Raleigh*, GREENSBORO DAILY NEWS, Mar. 29, 1960, at A1; *Judge Finds 22 Guilty of Sitdown Trespass*, GREENSBORO DAILY NEWS, Mar. 3, 1960, at A1; *Two Sentenced for Trespassing*, GREENSBORO DAILY NEWS, Apr. 27, 1960, at A4.

not exist, legislatures quickly enacted laws making it a crime “to refuse to leave an establishment when requested to do so by its operator.”⁹⁶ The new laws were described as efforts to protect property rights against the depredations of the sit-in protesters.⁹⁷ Courts also used their power to issue injunctions backed by contempt sanctions to supplement existing laws.⁹⁸ And, in the deep South, protesters frequently were brutalized, both by police and by counterprotesters.⁹⁹

Despite this predictable legal (and extralegal) opposition to their tactics, the sit-ins accomplished a variety of things. First, a number of merchants in cities affected by the sit-ins, and by the consumer boycotts they often inspired among sympathizers, responded by voluntarily ending the practice of segregated lunch counters.¹⁰⁰ The sit-ins put particular pressure on national companies, such as Woolworths, who, despite their willingness to serve blacks at their lunch counters in northern states, acquiesced in segregationist norms at their stores in the South, even in the absence of any legal compulsion to do so.¹⁰¹ After seven months of protests, Woolworth’s shifted away from a policy of blind deference to “local custom” and became one of the first lunch counters in Greensboro to offer integrated service.¹⁰² “[B]y September 1961, restaurants in 108 southern or border cities had ended racial segregation, as a result of the sit-ins.”¹⁰³ Typical in this

⁹⁶ *Negroes Plan Tests on Legal Fronts*, N.Y. TIMES, Mar. 20, 1960, at E8; see also *Anti-Sitdown Bills Passed*, GREENSBORO DAILY NEWS, Feb. 25, 1960, at B14 (describing three trespassing bills passed by the Virginia Senate prohibiting “any person who has been forbidden to do so from going into or staying on property” after they had been given notice).

⁹⁷ *See Stricter Laws of Trespass Approved*, GREENSBORO DAILY NEWS, Feb. 26, 1960, at A3 (“[The laws] would protect the rights of the private property owner to conduct his business as he might legally choose. . . . [T]he property owner could serve either or both races segregated or integrated as he saw fit.”).

⁹⁸ *See* MORRIS, *supra* note 72, at 247 (describing, as an example, Judge J. Robert Elliott’s “sweeping injunction, which barred Albany’s Negroes from unlawful picketing, congregating or marching in the streets, and from any act designed to promote breaches of the peace”).

⁹⁹ *See* WEISBROT, *supra* note 71, at 39 (referring to the “use of chains, knives, and attack dogs” to quiet antisegregation protesters).

¹⁰⁰ *See, e.g., id.* at 39 (“On May 10 four theaters and six lunch counters opened their doors to blacks.”).

¹⁰¹ *See* *Bell v. Maryland*, 378 U.S. 226, 271-78 (1964) (Douglas, J., concurring) (listing refusals by several companies in southern communities to serve blacks at their lunch counters).

¹⁰² WOLFF, *supra* note 91, at 167-73.

¹⁰³ ARTHUR I. WASKOW, *FROM RACE RIOT TO SIT-IN, 1919 AND THE 1960S: A STUDY IN THE CONNECTIONS BETWEEN CONFLICT AND VIOLENCE* 228 (1966).

regard was Winston-Salem, North Carolina, where merchants voted unanimously on May 23, 1960, to integrate their lunch counters.¹⁰⁴ Even retailers in segregationist strongholds like Birmingham, Alabama, proved susceptible to the pressure of the sit-in tactic, agreeing to desegregate their facilities months before the passage of the 1964 Civil Rights Act.¹⁰⁵

Second, the sit-ins helped to disabuse white southerners of the view that blacks were satisfied with the segregated status quo.¹⁰⁶ Confronted with the sit-ins, many white southerners initially continued to doubt that blacks were dissatisfied, arguing instead that the protests were surely the work of outside agitators.¹⁰⁷ But as the protests spread and gained strength, the truth of black anger at their second-class status became undeniable. In a letter to the editor, one white southerner explained how the protracted protests had opened his eyes to the injustice of commercial segregation:

For many years, while working every day in downtown Greensboro, I have enjoyed the privilege of eating a well-balanced mid-day meal in one of the lunch counters or restaurants in the business district. . . . The term "have enjoyed" is used advisedly. The pleasure of dining in my accustomed manner has recently been much diminished. That is because the lunch counter sit-down protests have brought to my attention in sharp focus an injustice that I formerly thought of, when at all, only vaguely. . . . If there is anything Christ-like, charitable or just about prohibiting a fellow man to eat, publicly, in any other than a vertical position, I challenge the most avid of segregationists to point it out.¹⁰⁸

¹⁰⁴ See *Lunch-Counter Mixing Is Voted in Winston*, GREENSBORO DAILY NEWS, May 24, 1960, at A1.

¹⁰⁵ See MORRIS, *supra* note 72, at 271 (reporting that on May 7, 1963, Birmingham businessmen reached a compromise regarding integration).

¹⁰⁶ See CHAFE, *supra* note 77, at 61 (describing Greensboro school board chairman John Foster's belief that most blacks were also doubtful about the merits of integration).

¹⁰⁷ See WOLFF, *supra* note 91, at 66-67; see also Mrs. T.F. Webster, Letter to the Editor, *Folly of Their Ways*, GREENSBORO DAILY NEWS, Apr. 4, 1960, at A8 ("Although these demonstrating students steadfastly declare this to be a spontaneous move, I am inclined to believe they have been indoctrinated, brainwashed and regimented by Negro leaders of their race from the pulpit on down through many organizations, mostly originating in the North . . .").

¹⁰⁸ James E. Brown, Sr., Letter to the Editor, *An Injustice*, GREENSBORO DAILY NEWS, Feb. 27, 1960, at A6.

Moreover, prior to the protests, many white politicians overestimated white enthusiasm for segregated facilities.¹⁰⁹ Despite predictions of doom, however, the *Greensboro Daily News* reported that the introduction of integrated lunch-counter service in Winston-Salem, North Carolina in May 1960 “took place quietly.”¹¹⁰ On the first day of integrated service, “[b]usiness appeared to be about normal . . . on a warm day when shoppers must have welcomed a convenient cool drink.”¹¹¹ By the end of 1961, it was increasingly difficult to hold on to the illusions, either of black acquiescence in, or of widespread white insistence on, segregated dining facilities, and, as a consequence, Miles Wolff says, “[m]any white southerners were getting an entirely new picture of the Negro.”¹¹²

Third, by refusing to be bound by property laws that ostensibly permitted merchants to exclude them on the basis of race, the protesting students demonstrated to local authorities their need for black cooperation in the preservation of private property rights. The disruption a few students were able to produce illustrated how even a small number of persistently uncooperative people can substantially undermine the ability of the most determined state to enforce established property rights. In his memoirs, John Lewis described how Nashville police were overwhelmed by a few hundred student protesters. “They couldn’t deal with the numbers they were facing,” he said, “[a]nd there was no more room at the jail.”¹¹³ Aldon Morris tells a similar story about Martin Luther King’s 1963 Birmingham campaign: “Bull Connor and his political officials also felt pressure, because the jails were filling up.”¹¹⁴ Retailers across the South complained about the effects of the sit-ins on their bottom line, due both to the boycotts organized by the protesters and their sympathizers and to the hesitance of white shoppers to frequent the store for fear of disorder.¹¹⁵

Finally, by taking the fight for civil rights out of the professionalized realm of civil litigation, the students succeeded in making it into

¹⁰⁹ See CHAFE, *supra* note 77, at 79 (“The notion of an angry white crowd about to rebel appears to have been as much a political creation of [North Carolina Governor Luther] Hodges as a fearsome social reality.”).

¹¹⁰ *Stores Begin Desegregated Lunch Service*, GREENSBORO DAILY NEWS, May 26, 1960, at A1.

¹¹¹ *Id.*

¹¹² WOLFF, *supra* note 91, at 150.

¹¹³ LEWIS, *supra* note 71, at 108.

¹¹⁴ MORRIS, *supra* note 72, at 267.

¹¹⁵ See WOLFF, *supra* note 91, at 171-74; MORRIS, *supra* note 72, at 269.

a mass movement, thrusting the civil rights question to the top of the nation's political agenda.¹¹⁶ Whereas President Eisenhower distanced himself from the protesters' lawbreaking, presidential candidate John Kennedy gave them his unqualified support, a move that injected civil rights into the heart of the 1960 presidential election and set the stage for the passage, after Kennedy's assassination, of the Civil Rights Act of 1964.¹¹⁷ Title II of that law prohibits discrimination on the basis of race in "any place of public accommodation," which it defines broadly to include everything from hotels to movie theaters to neighborhood hamburger joints.¹¹⁸ The statute, a direct response to the sit-in protests, substantially curtails the common law right of shop owners to exclude on whatever ground they see fit.¹¹⁹

C. *Intersectional Outlaws: Contemporary Urban Squatters*

1. Urban Squatters

The decades after World War II saw a massive migration of capital and people out of America's cities and into its suburbs.¹²⁰ This population shift, far from being purely an accident of market forces, was actively encouraged and, indeed, subsidized by the federal government.¹²¹ Through its creation of the interstate highway system and the discriminatory policies of the Federal Housing Administration (FHA), which would not guarantee mortgages in urban or racially integrated neighborhoods, government policy both lured and pushed investment capital out of inner cities and into outlying areas.¹²² Following the path laid by the FHA, private mortgage lenders simply refused to lend money for the construction or upkeep of properties within many urban neighborhoods.¹²³

¹¹⁶ See BLOOM, *supra* note 73, at 165.

¹¹⁷ See WEISBROT, *supra* note 71, at 45, 87 (noting that "Kennedy's presidency—and his martyrdom—had made civil rights an issue no successor could safely defuse").

¹¹⁸ Civil Rights Act of 1964, Pub. L. No. 88-352, tit. 2, § 201, 78 Stat. 241, 243.

¹¹⁹ See WASKOW, *supra* note 103, at 231.

¹²⁰ See KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 190-218 (1985).

¹²¹ See *id.* at 206 (noting that "[Federal Housing Administration] programs hastened the decay of inner-city neighborhoods by stripping them of much of their middle-class constituency").

¹²² See *id.* at 208 (discussing the FHA's concern with "inharmonious racial or nationality groups" within neighborhoods) (internal quotation marks omitted).

¹²³ See *id.* at 217.

In some cases, the owners of urban residential properties did not respond to this capital drought by simply selling their real estate. In order to maximize the return on their investment, they engaged in a practice called “milking,” taking advantage of favorable tax treatment and extracting rents from tenants while investing as little money as possible in the upkeep of their properties.¹²⁴ In the most run-down neighborhoods, the final stage of this process was often either “arson-for-profit” or the sale of the property to speculators with little interest in rehabilitating the dilapidated buildings.¹²⁵ In many cases, however, the owner simply abandoned his decrepit property, in which case it typically ended up in government hands after a tax foreclosure.¹²⁶

In the 1970s and 1980s, an epidemic of urban property abandonment led to a dramatic expansion of government-owned properties in cities across the country. By the 1980s, for example, New York City and Philadelphia each owned thousands of vacant buildings seized from delinquent taxpayers.¹²⁷ These derelict properties became zones of criminality.¹²⁸ Crack houses and shooting galleries attracted drug users, dealers, and prostitutes, whose activities terrorized and blighted entire neighborhoods.¹²⁹ Landlord abandonment therefore had the perverse effect of exacerbating the very urban ills on which subsequent abandonment was predicated. The result was an ever-widening zone of urban decay and dysfunction.¹³⁰

As the federal government did with its public lands in the nineteenth century, city governments attempted to quickly return this now publicly owned, abandoned property to the private sector by auctioning it to the highest bidder. In so doing, they hoped both to raise revenue and to foster private development that would, it was argued, increase the urban tax base.¹³¹ All too often, however, the highest bidder was a speculator who quickly allowed the property to fall back into tax arrears. In New York City, for example, in 1979 approximately ninety percent of auctioned properties were delinquent on

¹²⁴ See, e.g., CHRISTOPHER MELE, *SELLING THE LOWER EAST SIDE: CULTURE, REAL ESTATE, AND RESISTANCE IN NEW YORK CITY 188-94* (2000) (describing the process of disinvestment and abandonment in the New York’s Lower East Side).

¹²⁵ *Id.* at 192-94.

¹²⁶ *Id.* at 191.

¹²⁷ See Eric Hirsch & Peter Wood, *Squatting in New York City: Justification and Strategy*, 16 N.Y.U. REV. L. & SOC. CHANGE 605, 610 (1988).

¹²⁸ MELE, *supra* note 124, at 197.

¹²⁹ *Id.*

¹³⁰ *Id.* at 194.

¹³¹ See *id.* at 204-06; Hirsch & Wood, *supra* note 127, at 610.

property taxes within one year of their sale.¹³² When they were not auctioning it off to speculators, city governments seemed unable to figure out what to do with the property, often simply holding it in its dilapidated state, even in the face of strong local demand for low-income housing.¹³³ In Philadelphia, the city's program for distributing abandoned, city-owned houses to "homesteaders" was riddled by corruption and inefficiency and ended up being used to funnel houses toward well-connected speculators.¹³⁴

A federally funded pilot homesteading program was initiated in 1974, but it was small and primarily geared toward members of the middle class.¹³⁵ The statute creating the program authorized the Department of Housing and Urban Development (HUD) to transfer federally owned, unoccupied dwellings over to local homesteading projects. However, the statute somewhat schizophrenically indicated that, in designing their rules for eligibility, those projects were to weigh both homesteaders' need for housing and their ability to bear the financial burdens of rehabilitation.¹³⁶ These dual and contradictory considerations reflected disagreement among the program's designers over the question whether homesteading should be used primarily to rehabilitate housing and boost local property tax receipts, or instead to provide housing for the poorest citizens.¹³⁷ In its earliest years, the program helped rehabilitate only a handful of houses, most of which were occupied by people whose income placed them solidly in the middle class.

In the meantime, a consensus was forming among residents of blighted communities that absentee ownership was a source of

¹³² Stephen Katz & Margit Mayer, *Gimme Shelter: Self-Help Housing Struggles Within and Against the State in New York City and West Berlin*, 9 INT'L J. URBAN & REG'L RES. 15, 25 (1985).

¹³³ See Seth Borgos, *Low-Income Homeownership and the ACORN Squatters Campaign*, in CRITICAL PERSPECTIVES ON HOUSING 428, 433-35, 438-39 (Rachel G. Bratt et al. eds., 1986).

¹³⁴ *Id.* at 436-38.

¹³⁵ The federal program was based on section 810 of the Housing and Community Development Act of 1974. See Pub. L. No. 93-383, 88 Stat. 633, 734 (1974) (requiring that special consideration be given to a homesteader's capacity to make the required improvements to the property, a criterion that ultimately tipped the balance of the program in favor of moderate-income families); see also Seth Borgos, *The ACORN Squatters' Campaign*, 15 SOC. POL'Y 17, 19 (1984) (explaining that the federal homesteading program was having little impact on abandonment and the need for housing).

¹³⁶ 88 Stat. at 734.

¹³⁷ See Borgos, *supra* note 135, at 19 ("The inevitable tension between the 'housing need' criterion . . . and the 'capacity to repair' criterion . . . was left unresolved.").

neighborhood problems, and that conditions could be improved by transferring ownership from absentee landlords, the city, or speculators to local residents.¹³⁸ Neighborhood activists and advocates for low-income housing in cities across the country organized protests aimed at pushing governmental owners of abandoned urban properties to seek ways to convert those properties into housing for the poor. In the late 1970s and early 1980s, when conventional protests proved ineffective, several groups, most prominent among them the Association of Community Organizations for Reform Now (ACORN), initiated squatting campaigns to attract attention to their demands.¹³⁹ Unlike the squatters of the nineteenth century, who were motivated almost exclusively by a desire to acquire property for themselves, the urban squatters of the late twentieth century acted out of an amalgamation of motives, not least of which was a desire to express their opposition to the government's failure to provide adequate low-income housing in the cities.¹⁴⁰

These hybrid motives were reflected in a particularly clear way in ACORN's tactics. ACORN carefully selected squatters who were interested in becoming homeowners, but who could not afford to purchase housing on the open market.¹⁴¹ ACORN warned squatters that their actions were illegal, though "morally justifiable," and that there was no guarantee they would end up owning the home in which they squatted.¹⁴² ACORN required squatters to sign a "squatter's contract" in which they pledged to participate in "meetings, rallies, and other activities" organized by ACORN to pressure the city to reform its homesteading program.¹⁴³ Squatters also had to obtain signatures from seventy-five percent of the neighbors of the abandoned property to demonstrate neighborhood support for their action.¹⁴⁴ Finally, on the day the squatting was to begin, ACORN always alerted the media

¹³⁸ See MELE, *supra* note 124, at 203.

¹³⁹ See *id.* at 206; Borgos, *supra* note 133, at 435.

¹⁴⁰ See Hirsch & Wood, *supra* note 127, at 613-14 (explaining how ACORN organized squatting in New York City in order to force officials to negotiate a solution to the housing shortage); James F. Clarity, *Philadelphia's Poor Taking over Houses To Fight City Decay*, N.Y. TIMES, June 12, 1977, at 1 (describing Philadelphia's "tacit approval" of squatting in abandoned housing to address the housing crisis and prevent the poor from being pushed out of certain areas).

¹⁴¹ See Borgos, *supra* note 133, at 434-35.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

and held a rally, which often featured local ministers and elected public officials.¹⁴⁵

2. Legal Responses

The official responses to the urban squatting movements varied widely. Patricia Harris, President Carter's HUD Secretary, described squatters in Philadelphia as "no better than shoplifters."¹⁴⁶ The president of the Philadelphia City Council called the squatting movement the "beginning of anarchy."¹⁴⁷ Many mayors denounced squatters and refused to deal with them.¹⁴⁸ Moreover, squatters often were arrested and their homes demolished.¹⁴⁹ Seth Borgos describes the hostile reaction of most public officials to ACORN's 1982 squatting campaign:

City and federal authorities cracked down hard in some locations. Squatters were arrested in Pittsburgh and St. Louis; a HUD Area Office manager led a midnight raid on a squatter's house in Dallas; the St. Louis Land Reutilization Authority filed a \$500,000 civil suit against ACORN and the leaders of its squatting group.¹⁵⁰

In many cases, however, squatters were able to get government owners to grant title in the occupied housing to squatters.¹⁵¹ Half of the 200 squatters who participated in Milton Street's 1977 squat in HUD-owned housing in Philadelphia, for example, obtained title to the properties they occupied.¹⁵²

¹⁴⁵ See *id.* Not all urban squatting movements were as overtly expressive in their practices. Some movements, such as the "Homes Not Jails" (HNJ) movement in San Francisco, often engaged in covert squatting that simply aimed to get the homeless indoors. See ANDERS CORR, NO TRESPASSING! SQUATTING, RENT STRIKES, AND LAND STRUGGLE WORLDWIDE 20 (1999) ("This dual covert and public strategy allows HNJ to immediately provide housing for homeless people . . ."). Other squatters, particularly those in continental Europe or those in North America influenced by the European squatting tradition, viewed squatting almost as a form of artistic expression rather than a form of overtly political dissent. See, e.g., FOUNDATION FOR THE ADVANCEMENT OF ILLEGAL KNOWLEDGE, CRACKING THE MOVEMENT: SQUATTING BEYOND THE MEDIA 29-45 (Laura Martz trans., Autonomedia 1994) (1990) ("Squatters were artists because they moved into empty space to play in it, and on no account to 'furnish' it.").

¹⁴⁶ Borgos, *supra* note 133, at 433 (internal quotation marks omitted).

¹⁴⁷ *Id.*

¹⁴⁸ See *id.* at 439.

¹⁴⁹ See, e.g., Hirsch & Wood, *supra* note 127, at 613-14 (describing New York City's arrest of eighteen squatters and demolition of their building in 1985).

¹⁵⁰ Borgos, *supra* note 133, at 439.

¹⁵¹ See *id.* at 433.

¹⁵² *Id.*

In an urban parallel to the experience of nineteenth-century squatters on the American frontier, some squatting campaigns led to the creation or expansion of city-run homesteading programs targeting low-income residents. New York City, for example, ultimately responded to illegal squatting movements by establishing a legal system for urban homesteading on abandoned, city-owned properties.¹⁵³ In New York's Lower East Side, for example, twenty-eight buildings were fully renovated and acquired by tenants through the city's homesteading program.¹⁵⁴ Similarly, ACORN's 1979 squatting campaign in Philadelphia led to the reform of that city's troubled urban homesteading program and inspired similar squatting efforts across the country.¹⁵⁵

ACORN's 1982 squatting campaign sought to shift federal policy toward an exclusive focus on low-income housing within the federal homesteading program.¹⁵⁶ The visibility of ACORN's protests led to congressional hearings, and in 1983, the federal program was reoriented toward lower-income homesteaders.¹⁵⁷ The federal effort remained small, though, and never accounted for more than a tiny percentage of federal housing efforts.¹⁵⁸

Perhaps the greatest achievement of the urban squatting movements, however, was in the domain of public opinion. As a method of protest, urban squatting was extremely photogenic.¹⁵⁹ Squatters' activities consistently attracted media attention, most of it favorable.¹⁶⁰ The image of squatters attempting to reclaim abandoned property through their own labor was appealing to American audiences, notwithstanding a general political conservatism in the early 1980s that

¹⁵³ See Hirsch & Wood, *supra* note 127, at 615 (detailing "the creation of dozens of new units of housing for the low-income residents of East New York"); see also MALVE VON HASSELL, *HOMESTEADING IN NEW YORK CITY, 1978-1993: THE DIVIDED HEART OF LOISIDA* 4, 21-25 (1996) ("In the early 1980s, the New York City Department of Housing Preservation and Development accepted and incorporated the Urban Homesteading Program . . .").

¹⁵⁴ See VON HASSELL, *supra* note 153, at 26.

¹⁵⁵ See Borgos, *supra* note 133, at 435-37.

¹⁵⁶ See *id.* at 439-41 (noting that ACORN's advocacy led to the introduction of legislation in Congress to reform federal housing programs).

¹⁵⁷ See Housing & Urban-Rural Recovery Act of 1983, Pub. L. No. 98-181, tit. III, § 301, 97 Stat. 1196 (1983) (amending the U.S. Housing Act of 1937).

¹⁵⁸ See William A. Rohe, *Expanding Urban Homesteading*, 57 J. AM. PLAN. ASS'N 444, 445 (1991).

¹⁵⁹ See Borgos, *supra* note 133, at 442.

¹⁶⁰ See *id.*

typically manifested itself as hostility toward poverty-relief programs.¹⁶¹ Even politicians who opposed urban squatters have acknowledged the romantic power of their actions.¹⁶² Urban squatters were, therefore, extremely effective at keeping the problem of low-income housing on the political agenda, winning a few modest legislative victories along the way, at a time when the tables were stacked heavily against them.

II. WHY PROPERTY OUTLAWS?

We are obviously not the first to observe the important role of intentional lawbreaking in fostering legal change. Legal theorists have long left some space for the occasional disorder created by conscientious civil disobedience. The many discussions of intentional lawbreaking within legal philosophy reflect three broad approaches: one rooted in the dignity of individual conscience, one oriented toward the correction of imperfections in the majoritarian political process, and one celebrating a pluralistic conception of legal interpretation. Two shortcomings of this literature, however, are of particular interest to this paper. First, these discussions typically fail to distinguish among the various substantive areas of law on which the mechanisms of intentional lawbreaking might operate. Second, they tend to oversimplify the nature of disobedience by disfavoring what we are calling “acquisitive” disobedience, in large part because of their focus on the lawbreaker’s subjective state of mind as crucial to the justification of the lawbreaking. In this Part, we address the first of these issues. In the next Part, we address, among other things, the significance (and at times insignificance) of the lawbreaker’s subjective state of mind in evaluating the proper legal response to lawbreakers.

Ronald Dworkin, who has offered one of the most influential accounts of civil disobedience, has made a powerful argument for its (limited) legitimacy, based on the power of individual conscience. He suggests that the operation of self-interested motives necessarily calls into question the justification for breaking the law. Dworkin argues that lawbreaking can be justified, at times, when it is undertaken in order to protect a person’s sense of integrity, as when the law requires people to perform acts that they view as deeply immoral, or when law-

¹⁶¹ *See id.*

¹⁶² *See* Thomas J. Leuck, *Police Evict Squatters from Three City-Owned Tenements in the East Village*, N.Y. TIMES, Aug. 14, 1996, at B3 (quoting Mayor Rudolph Giuliani as complaining about the “whole romantic thing about squatters” and arguing that squatters were essentially “cheat[ers]” who were “trying to chisel”).

breaking is employed as a means of expressing the injustice of an existing law.¹⁶³ He distinguishes these two motives for lawbreaking from conduct that is aimed at merely expressing or hindering the foolishness of a particular law, which he views as more difficult to justify.¹⁶⁴ Moreover, he distinguishes all three sorts of conscientious lawbreaking from “ordinary criminal activity motivated by selfishness or anger or cruelty or madness,” which he says is always wrong.¹⁶⁵

In contrast to Dworkin’s conscience-centered account of justified disobedience, some scholars have focused on the instrumental role of disobedience as a tool to challenge the inertia of the political system that impedes legal change. In a recent essay in the *Yale Law Journal*, Daniel Markovits sets forth a justification that is more expansive than Dworkin’s, one based not on the governing role of individual conscience, but on the nature of governance itself. His paper valuably highlights the institutional role of intentional lawbreaking as a tool for exposing and overcoming inertia within democratic processes.¹⁶⁶ Markovits views inertia as an inescapable feature of democracy, one that is necessary for the cultivation and reproduction of democratic engagement.¹⁶⁷ He argues that, through the practice he terms “democratic disobedience,” civil disobedients can overcome that inertia by using disobedience to bring outmoded laws to the attention of lawmakers and the electorate, forcing onto the agenda issues that might otherwise go undetected.¹⁶⁸

Finally, in his classic *Harvard Law Review* foreword, Robert Cover takes an even broader approach, describing some lawbreaking as part of a process of decentralized legal interpretation through which dissenting groups pursue their own normative visions by structuring their lives around their own particular legal understandings.¹⁶⁹ According

¹⁶³ See RONALD DWORKIN, A MATTER OF PRINCIPLE 108-10 (1985).

¹⁶⁴ See *id.*

¹⁶⁵ *Id.* at 105; see also JOHN RAWLS, A THEORY OF JUSTICE 365, 372 (3d prtg. 1972) (arguing that “civil disobedience cannot be grounded solely on group or self-interest” and observing that it should not be used to challenge economic or social policies, which are too closely bound up with self-interest); MICHAEL WALZER, OBLIGATIONS: ESSAYS ON DISOBEDIENCE, WAR, AND CITIZENSHIP 20 (1970) (contrasting justifiable civil disobedience with “frivolous or criminal disobedience” not based on “morally serious” objections).

¹⁶⁶ Daniel Markovits, Essay, *Democratic Disobedience*, 114 YALE L.J. 1897, 1934-48 (2005).

¹⁶⁷ See *id.* at 1921-28, 1934-35.

¹⁶⁸ See *id.* at 1938-39.

¹⁶⁹ See generally Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

to Cover, the private legal conceptions of these dissenting groups are, at least as an initial matter, no less “law” than the official legal understandings enshrined in the formal law of the dominant community.¹⁷⁰ It is possible, Cover argues, that lawbreakers and judges alike “are all engaged in the task of constitutional understanding,” and their distinctive perspectives “make us realize that we cannot pretend to a unitary law.”¹⁷¹ In contrast to Dworkin’s state-centered conception of civil disobedience as an exceptional case of justified deviation from official versions of the law, and to Markovits’s discussion of disobedience as a mechanism for vindicating subsumed majoritarian impulses, Cover views conscientious disobedience as an example of faithful commitment to a dissenting minority’s own understanding of law.

Applying this conception, Cover describes the Greensboro sit-in protesters not as lawbreakers so much as a group of people “conform[ing] its public behavior to its own interpretation of the Constitution.”¹⁷² According to Cover, that behavior does not occur in a vacuum. By choosing to honor their commitment to an unofficial version of law, the sit-in protesters remained true to their normative community while also communicating to those in officialdom a forceful message of dissent. Equally important, in a manner not possible through any other means of legal discourse, they forced public officials make a choice as to the strength of their own commitments to the official legal status quo—a choice that, in the case of the 1960 sit-ins, some officials answered by embracing the protesters’ legal interpretation.¹⁷³

While these three accounts offer generalized conceptions of the role of disobedience within our democratic political system, they fail to take specific account of the peculiar role of property in disobedient dissent. We argue, for reasons that are ultimately different from the justifications offered by Dworkin, Markovits, and Cover (though perhaps closest to Cover’s), that the law should be careful not to protect property rights in such a way as to preclude outlaws from productively violating existing official legal norms. We also seek to add a further refinement to their justifications by focusing on the unique advan-

¹⁷⁰ See *id.* at 15-19.

¹⁷¹ *Id.* at 33.

¹⁷² *Id.* at 47.

¹⁷³ See, e.g., *City of Raleigh v. Forbes* (Wake County Super. Ct., Apr. 22, 1960), cited in 5 CIV. LIBERTY DOCKET 68 (June 1960) (reversing the convictions of forty-three protesters arrested for trespassing on a private stretch of sidewalk outside a shopping center); see also Cover, *supra* note 169, at 47-48.

tages that *property* lawbreaking offers to private citizens who are disenfranchised from institutionalized structures. Outlaws play a recurrent role in vindicating rights, overcoming inertia, and fostering normative diversity within the area of property law. Moreover, by creating an informal space for actively reevaluating and challenging dominant legal interpretations, they help catalyze formal changes when law is based on outdated assumptions or has otherwise failed to give due regard to the rights or interests of some segment of the community. In focusing on the particular value of lawbreaking for the development of property law, however, we do not deny that disobedience can be (and has been) used effectively to express political dissent about any number of questions.

Our argument for the special significance of *property* lawbreaking proceeds in four stages: (1) first, we observe the (subjective and objective) importance of property in people's day-to-day lives; (2) next, for reasons related to its importance, we argue that property doctrines and distributions have a particularly strong tendency toward inertia and ossification; (3) somewhat paradoxically, however, despite its apparent stability, violations of property laws are typically seen as less culpable than other categories of criminal acts; and (4) because of property's blend of importance, stability, and violability, property lawbreaking acquires a unique communicative power to reimagine our relationships with the material world and with each other, and to provide an informal forum for the airing of conflicts over resources between owners and nonowners, which the law can eventually shift to accommodate.

A. *Important Role of Property in People's Lives*

Tangible and intangible property laws play a vitally important role in shaping people's lives. Hegelian theorists, such as Margaret Jane Radin, have thoughtfully elaborated theories asserting that property ownership is uniquely essential to the construction of personal identity.¹⁷⁴ The control we enjoy over our property develops our capacity to act as autonomous beings.¹⁷⁵ Moreover, our public exhibition of

¹⁷⁴ See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957 (1982) (arguing that "to achieve proper self-development . . . an individual needs some control over resources in the external environment").

¹⁷⁵ See *id.* at 972-73.

such control permits us to communicate that autonomy to our fellow citizens.¹⁷⁶

One need not fully embrace Hegel's Philosophy of Right, or go as far as Radin in asserting a connection between property and personal identity, to appreciate the unique value of property in the construction and experience of our social reality. Ownership of land and the structures attached to land provide the spaces and places in which we carry out our social existence and clarify the divisions of labor, responsibility, and authority necessary for the very conduct of human society. Accordingly, property rights and the social norms that accompany (and are often reinforced by) property ownership play an important role in ordering our interactions with other human beings. As Nicholas Blomley has put it, "[t]he environment of the everyday is . . . propertied, divided into both thine and mine and more generally into public and private domains, all of which depend upon and presuppose the internalization of subtle and diverse property rules that enjoin comportment, movement, and action."¹⁷⁷

Crucially, this importance of property for human beings points in several directions at once. On the one hand, it suggests a need to forcefully protect existing property entitlements.¹⁷⁸ On the other hand, the centrality of property to the satisfaction of fundamental human needs in turn creates a strong impetus for those excluded from participation in the system of ownership to challenge both existing property rules and established property entitlements.¹⁷⁹

For example, those who are utterly excluded from access to the social benefits of private ownership, such as the very poor and the homeless, find themselves extraordinarily isolated from much of the social and commercial activity that most of us take for granted.¹⁸⁰ This

¹⁷⁶ See JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 353-57, 372-75 (1988) (discussing "Hegel's thesis . . . that by appropriating, owning, and controlling objects, a person can establish his will as an objective feature of the world"); Peter G. Stillman, *Property, Freedom, and Individuality in Hegel's and Marx's Political Thought*, in *NOMOS XXII: PROPERTY*, 130, 136-40 (J. Roland Pennock & John W. Chapman eds., 1980) (similar).

¹⁷⁷ Blomley, *supra* note 9, at 131.

¹⁷⁸ See, e.g., Radin, *supra* note 174, at 1007-08 (suggesting that courts ought to protect personal property more forcefully than development rights or commercial plans).

¹⁷⁹ See Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 309, 310 (2006) (quoting a University of Texas economist as saying that he favored private property so much that he "want[ed] everyone . . . to have some").

¹⁸⁰ Cf. Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 318 (1991) (arguing that because society makes freedoms dependent on having prop-

isolation, rooted ultimately in our system of property distribution, can cause enormous psychological, and even physical, harm.¹⁸¹ The isolating and disabling effects of *exclusion* from participation in a property system, however, mean that those on the outside looking in will often have few means to communicate their dissent beyond the simple act of taking or occupying.

This duality of stability and conflict is further complicated by the simultaneous over- and underinclusiveness of ownership as the crucial link between property and identity. Not all property owners feel the same expressive and interactive link between property, ownership, and identity, a factor that directly implicates the productive role of the lawbreaker in shifting entitlements.¹⁸² Vast numbers of property owners (publicly traded corporations and their shareholders, for example) feel no essential connection to a great deal of their owned properties. Conversely, many nonowners feel strong connections to many things they do not own but come into intimate contact with for any number of reasons.¹⁸³ This mismatch underlies the ambiguous role of the property outlaw and sets the stage for productive disobedience.

B. *Property's Conservatism and Stability*

In part because of its importance, property law is unusually resistant to legal change. Indeed, central to the ability of the institution of property to carry out its functions are the stability and predictability that it fosters for both owners and nonowners alike. As Abraham Bell and Gideon Parchomovsky have argued, "the institution of property is designed to create and defend the value that inheres in *stable* ownership."¹⁸⁴ As Thomas Merrill and Henry Smith have argued, fixed, sta-

erty on which to exercise those freedoms, any ban on public activities has disproportionate implications for the freedom of the homeless).

¹⁸¹ See CLAUDE S. FISCHER, TO DWELL AMONG FRIENDS: PERSONAL NETWORKS IN TOWN AND CITY 252-53 (1982); AMITAI ETZIONI, *Liberals and Communitarians*, in A RESPONSIVE SOCIETY: COLLECTIVE ESSAYS ON GUIDING DELIBERATE SOCIAL CHANGE 127, 140 (1991).

¹⁸² See, e.g., George Kateb, *The Night Watchman State*, 45 AM. SCHOLAR 816, 824-25 (1976) (reviewing ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974)) (observing that property owners do not have "nerve endings in every dollar of [their] estate[s]").

¹⁸³ Participants in the sit-down strikes in the 1930s at General Motors (and their sympathizers) frequently emphasized that, as workers, their interest in the company's property was superior to the property rights of shareholders. See Robert Morss Lovett, *A G.M. Stockholder Visits Flint*, NATION, Jan. 30, 1937, at 123, 123-24.

¹⁸⁴ Bell & Parchomovsky, *supra* note 8, at 551 (emphasis added); see also CAROL M. ROSE, *Seeing Property*, in PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY,

ble property rules provide informational benefits, not just for the owner, but for the entire community that orders itself around those entitlements.¹⁸⁵ In addition, as Radin has observed, stable property rights help individuals develop their identities and carry out their life plans.¹⁸⁶

Almost by definition, then, property law resists changes to its contours for the very reason that change, as such, strikes at what decision makers typically view as one of its core traits. Indeed, American property law is full of doctrines whose principal purpose appears to be the hindrance of nonconsensual alterations in existing property allocations and entitlements. Laws governing contract, fraud, theft, and trespass wrap existing property entitlements in a blanket of public and private legal protection. And takings law, particularly the doctrine of regulatory takings, has the effect of making it more difficult for the government to rearrange or redefine existing property rights. A regulatory taking can be found only when there has been some change in property law.¹⁸⁷ By requiring compensation for some such changes, takings law serves as a check on political property reform, a function that has endeared it to libertarians as a legal vehicle for hindering activist government.

Similarly, property doctrine demonstrates a pervasive tendency to favor first-in-time property users. When two litigants have more or less equivalent claims, property doctrine almost reflexively favors the prior user, appropriator, or occupant.¹⁸⁸ Likewise, the conclusion that a plaintiff has “come to a nuisance,” although not an iron-clad defense, often makes it harder (or at least more expensive¹⁸⁹) for that

AND RHETORIC OF OWNERSHIP 267, 272 (1994) (“[D]uration is an important element in making a claim *property*, as opposed to a merely temporary usufruct.”).

¹⁸⁵ See, e.g., Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 8 (2000); Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 778-79 (2001).

¹⁸⁶ Margaret Jane Radin, Speech, *The Colin Ruagh Thomas O’Fallon Memorial Lecture on Reconsidering Personhood*, 74 OR. L. REV. 423, 429-31 (1995).

¹⁸⁷ See Holly Doremus, *Takings and Transitions*, 19 J. LAND USE & ENVTL. L. 1, 1-5, 11-12 (2003); *id.* at 11 (“Regulatory takings claims are all about change.”).

¹⁸⁸ See, e.g., Ralph W. Aigler, *The Operation of the Recording Acts*, 22 MICH. L. REV. 405, 406 (1924) (noting that competing claims are settled on the basis of time, not notice).

¹⁸⁹ See *Spur Indus. v. Del E. Webb Dev. Co.*, 494 P.2d 700, 706-08 (Ariz. 1972) (holding that a developer who came to a nuisance could enjoin the nuisance but had to indemnify the property owner).

plaintiff to obtain relief.¹⁹⁰ Accordingly, the rule has the effect of providing a qualified grandfather protection for preexisting property uses.

Finally, although not a legal protection, the so-called endowment effects and status quo biases described by behavioral economists suggest that people, in general, will be willing to pay more to avoid parting with property in their possession than they will to acquire new property.¹⁹¹ Applied to processes for change in property law and distributions, this insight suggests that, all things being equal, people who benefit from existing property regimes will tend to resist changes in that regime more forcefully than others will push for their modification. When combined with the obvious advantages that current property owners have over nonowners in the political process, endowment effects likely exert a conservative influence that helps to make property law resistant to political change. As a result of these mutually reinforcing conservative tendencies, official property doctrine is especially unlikely to keep pace with the shifting conditions of the society that hosts them.

C. Nonviolent Property Crimes as Less Serious Than Other Sorts of Crimes

At the same time that property is considered to be so sacred, so revered, within our legal system, it is ironically also considered to be less inviolable than other forms of law. Even those who are conscientiously opposed to violence as a means of political expression are usually willing to violate *property* laws in order to draw attention to their grievances.¹⁹² Like an effigy, property is an effective target of protest because of its visible, often physical, identification with the owner or the prevailing legal regime. But, Hegelian hyperbole aside, property

¹⁹⁰ See, e.g., *Escobar v. Cont'l Baking Co.*, 596 N.E.2d 394, 398 (Mass. App. Ct. 1992) (“No one can move into a quarter given over to foundries and boiler shops and demand the quiet of a farm.” (quoting *Stevens v. Rockport Granite Co.*, 104 N.E. 371, 373 (Mass. 1914))); *Rassier v. Houim*, 488 N.W.2d 635, 638 (N.D. 1992) (“[A]nyone who comes to a nuisance ‘has a heavy burden to establish liability.’” (quoting *Jerry Harmon Motors, Inc. v. Farmers Union Grain Terminal Ass’n*, 337 N.W.2d 427, 432 (N.D. 1983))); see also W. Page Keeton et al., *PROSSER AND KEETON ON THE LAW OF TORTS* § 88, at 630 (5th ed. 1984) (listing the priority of the alleged nuisance as a factor to be considered in determining whether the use is in fact a nuisance).

¹⁹¹ See, e.g., Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1326 (1990).

¹⁹² See, e.g., WALZER, *supra* note 165, at 24 (describing the traditional opposition of theorists of civil disobedience to any coercion beyond the violation of trespass laws).

is decidedly not the person. Accordingly, nonviolent violations of property rights constitute a broadly acceptable means of communicating strong moral disapproval. The sit-in and the picket are therefore favorite tools of those seeking nonviolently to change the behavior of the property owner.

Perhaps for similar reasons, the hierarchy of values placing bodily injury over harm to property forms the basis for the *Model Penal Code's* treatment of the doctrine of necessity. As we discuss at length below, that doctrine justifies violation of criminal laws undertaken in order to avoid greater harms.¹⁹³ The doctrine therefore raises the crucial question how to weigh various categories of harms. In discussing necessity, the commentary to the *Model Penal Code* makes clear that harm to persons should always be given more weight than harm to property.¹⁹⁴ Property might be harmed to avoid death or bodily injury, but the opposite should never be permitted.

Finally, our moral intuitions make us more willing to excuse the hungry man who quietly sneaks a loaf of bread from a grocery store than someone faced with the same dilemma who satisfies his needs by threatening a passerby. Criminal laws affirm this intuition by treating simple theft as less serious than robbery.¹⁹⁵ The reason lies in a broad consensus that the act of surreptitiously taking someone's property is less blameworthy than doing so in a way that threatens bodily harm. A related intuition may also underlie the common law definition of burglary, which requires that the defendant enter someone's dwelling at night with the intent to commit a felony.¹⁹⁶ The twin requirements that the invaded structure be a dwelling and that the invasion occur at night may reflect efforts to isolate those invasions in which the occupant is probably present, confusion heightened, and bodily injury more likely to result.¹⁹⁷ In light of the apparent consensus that violations of property rights are less serious than bodily harm, it is not surprising that nonowners, disregarded by the political process but acutely aware of the shortcomings of the dominant legal regime, have

¹⁹³ MODEL PENAL CODE § 3.02 (1962); see also *infra* Part II.C\2).

¹⁹⁴ MODEL PENAL CODE § 3.02 cmt. 1; see also Larry Alexander, *Lesser Evils: A Closer Look at the Paradigmatic Justification*, 24 J.L. & PHIL. 611, 613 (2005).

¹⁹⁵ See Alon Harel, *Efficiency and Fairness in Criminal Law: The Case for a Criminal Law Principle of Comparative Fault*, 82 CAL. L. REV. 1181, 1219-26 (1994).

¹⁹⁶ State v. Hudson, 165 A. 649, 650 (R.I. 1933).

¹⁹⁷ See Joshua Getzler, *Use of Force in Protecting Property*, 7 THEORETICAL INQUIRIES L. 131, 143 (2005) ("Night-time intruders can more likely expect to confront the inhabitants, and a prepared and watchful intruder might easily prevail against sleepy and surprised dwellers.").

frequently perceived property disobedience to represent an acceptable means for altering the status quo.

We are under no illusions that property outlaws will always pursue ends that we consider good or worthy. Intentional lawbreaking has been used in the defense of oppression and discrimination just as it has been used to foster liberation and equality. The nature of property lawbreaking suggests that it will be used by nonowners more than owners and by those isolated from the majoritarian process more than by those well connected to the levers of power.¹⁹⁸ But this does not guarantee that it will be directed toward progressive ends. Nineteenth-century squatters, for example, frequently dispossessed Native Americans of their land even as they clamored for recognition of their own informal property rights.¹⁹⁹ Similarly, racist property owners continue to break the law and exclude people from their public accommodations on the basis of race,²⁰⁰ just as the civil rights protesters dissented from the pre-Title II status quo by forcing themselves onto segregationist property, in violation of trespass laws recognizing in owners an unqualified right to exclude. While our own political proclivities lead us to view civil rights lawbreaking more sympathetically than segregationist lawbreaking, we believe that both lawbreakers qualify as “property outlaws.” We intend our discussion to encompass both actors whose ends we share and those whose ends we find reprehensible. It is likely the case, however, that the legal responses we discuss in Part III will have different impacts on different sorts of property outlaws, based on differences in the objective circumstances and aims of the outlaws and in the democratic response to their activities.

D. *The Communicative Abilities of Property Lawbreaking*

Property’s combination of importance, rigidity, and violability gives property lawbreaking a unique communicative power. Property’s importance and rigidity mean that property law will often fall out of step with the values of the community it serves. But, paradoxically, its simultaneous importance and violability will also combine to

¹⁹⁸ Of course, owners sometimes also engage in outlaw tactics. *See, e.g.,* Rapanos v. United States, 126 S.Ct. 2208, 2214 (2006) (deciding a case in which a property owner backfilled his wetlands, allegedly in violation of federal law).

¹⁹⁹ *See, e.g.,* STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER 242 (2005) (discussing the encroachment on Navajo property by white trespassers).

²⁰⁰ *See* Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law’s Response to Racism*, 42 U. MIAMI L. REV. 127, 127-28 (1987).

encourage dissidents to resort to lawbreaking to register their strong dissent.

The power of this dissent takes two forms. First, the willingness to break the law signals the intensity of the dissenting position. As Cover put it:

The community that disobeys the criminal law upon the authority of its own constitutional interpretation . . . forces the judge to choose between affirming his interpretation of the official law through violence against the protesters and permitting the polynomia of legal meaning to extend to the domain of social practice and control. The judge's commitment is tested as he is asked what he intends to be the meaning of his law and whether his hand will be part of the bridge that links the official vision . . . with the reality of people in jail.²⁰¹

Cover's observation, however, conflates the intensity signaled by a willingness to endure (or mete out) criminal punishment with a second, deeper source of lawbreaking's communicative power.

The intensity of the dissent communicated by the lawbreaker (or the commitment signaled by the law enforcer) is, of course, communicated whether the protester objects to the very law being broken or to some other law. But if dissident legal interpretations are to perform the role of exposing unjust, inefficient, or outdated legal norms, they must sometimes be acted out in practice and not merely be the subject of abstract discussion, even discussion that is powerfully accompanied by the exclamation mark of lawbreaking. As one observer noted during the 1960 sit-ins, "[n]o argument in a court of law could have dramatized the immorality and irrationality of [segregated lunch counters] as did the sit-ins."²⁰²

There is a difference between talking about something and being confronted with an actual example of it. In a different context, John Hart Ely, quoting Alexander Bickel, hinted at the common-sense epistemological reasons for this difference between mere discussion and actual confrontation:

[T]here are reasons for supposing that our moral sensors function *best* under the pressure of experience. Most of us did not fully wake up to the immorality of the war in Vietnam until we were shown pictures of Vietnamese children being scalded by American napalm. . . . "The effect [of watching vicious white supremacists spewing racist epithets at black

²⁰¹ Cover, *supra* note 169, at 47-48.

²⁰² CHARLES M. PAYNE, I'VE GOT THE LIGHT OF FREEDOM: THE ORGANIZING TRADITION AND THE MISSISSIPPI FREEDOM STRUGGLE 78 (1995) (internal quotation marks and footnote omitted).

children] must have been something like what used to happen to individuals (the young Lincoln among them), at the sight of an actual slave auction”²⁰³

Property law deals with tangible (and intangible) realms that touch on basic necessities and entitlements. In breaking those laws, outlaws are able to offer us a concrete vision of their alternative conception of the law. The property outlaw therefore provides the official decision maker with actual, rather than hypothetical, circumstances under which to evaluate the degree of her commitment to the status quo. Discussions *about* dissenting legal interpretations, even those backed by the forceful message of civil disobedience, leave much to the imagination. The relative violability of property laws means that property outlaws can sometimes actually live out their alternative conception of property relations by violating the law in the very way they would like to see it changed. Their actions can reverse the operation of the status quo bias and force officials and members of the public to confront an actual instance (as opposed to an abstract concept). Both of these effects give them an exceptional ability to push those in power toward a different conclusion than might have been expected based on the political currents that prevailed before they acted.²⁰⁴

The importance of being able to conjure an alternative vision of legal possibility through the violation of property laws should not be understated. It can be all too simple to reject or judge an abstraction. But our generalized ethical commitments are often incomplete or indeterminate. They may well be poor predictors of our actual moral judgments when confronted with specific instances of dissenting legal interpretations being lived out in their full human richness.²⁰⁵

Thus, whites in the 1960s South, who might have expressed opposition when abstractly questioned in advance about integrated lunch

²⁰³ John Hart Ely, *The Supreme Court, 1977 Term—Forward: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 35 (1978) (quoting ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 267 (1962)).

²⁰⁴ In many ways, then, property outlaw behavior is the private law analog to what Heather Gerken has, in the public law context, called “dissenting by deciding.” Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1754-59 (2005). In both cases, the acting out of legal dissent provides decision makers with an especially vivid understanding of the alternative legal conception that the dissenter is inviting her to embrace.

²⁰⁵ Cf. MARTHA C. NUSSBAUM, *THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY* 300-01 (1986) (“Principles . . . fail to capture the fine detail of the concrete particular, which is the subject matter of ethical choice.”).

counters, sometimes reacted to the student sit-ins in ways that were unexpected, perhaps even to themselves. For example, in response to her observation of black students being turned away from a lunch counter in Raleigh, one "elderly white woman of the old school" said: "They have no business refusing such nice, polite young people."²⁰⁶ Even the segregationist *Richmond News Leader* found its preconceived notions of black and white challenged by the sit-in protesters. It gave the following account of one of the sit-ins:

Here were the colored students, in coats, white shirts, ties, and one of them was reading Goethe and one was taking notes from a biology text. And here, on the sidewalk outside, was a gang of white boys come to heckle, a ragtail rabble, slack-jawed, black-jacketed, grinning fit to kill, and some of them, God save the mark, were waving the proud and honored flag of the Southern States in the last war fought by gentlemen. Eheu! It gives one pause.²⁰⁷

The concrete living out of an alternative legal conception by property outlaws can undermine opposition to reform that may be based on irrational prejudice and untested presuppositions. At the outset of the sit-in protests in the South, the *Wall Street Journal* editorial page warned its readers of the evils of civil rights legislation that would go beyond the recognition of equal public rights and seek "to compel immediate social integration."²⁰⁸ The proposed legislation, it predicted, "is doomed to failure. . . . Such enforced togetherness amounts to regimentation, an invasion of individual rights."²⁰⁹ It was not until black southerners simply took for themselves the right to sit at the same lunch counters as whites, forcing togetherness in the absence of legal protection (indeed, in direct opposition to the owners' legal right to exclude), that the segregationists' predictions of doom began to be debunked. In over one hundred cities across the South, lunch counters were desegregated in response to the sit-ins, three years prior to the passage of Title II of the Civil Rights Act, in many cases without the violent white reaction predicted by naysayers at the *Wall Street Journal* and elsewhere. The success of that experience likely helped smooth the path for the passage of Title II and undermined arguments that "enforced togetherness" was doomed to failure.

²⁰⁶ WOLFF, *supra* note 90, at 152.

²⁰⁷ James Kilpatrick, RICHMOND DAILY NEWS, Feb. 22, 1960.

²⁰⁸ *Some Racial Facts and Fallacies*, WALL ST. J., Mar. 25, 1960, at 8.

²⁰⁹ *Id.*

III. RESPONDING TO PROPERTY OUTLAWS

Until now, we have focused on the productive role of the lawbreaker in catalyzing evolution within property law. At this point, we would like to expand our discussion of the outlaw to focus on her occupation of the important intersection between property law and criminal law. Inasmuch as the property lawbreaker plays an integral part in forcing the evolution of property law, she also faces a substantial risk of punishment, the default state response to intentional lawbreakers. Given the important position that outlaws have occupied in the evolution of property law, however, we believe that it is essential for the law to retain a certain flexibility in its response to them. Although our focus in this discussion is on criminal enforcement of property law, the same general observations would appear to apply to noncriminal enforcement through sanctions such as punitive damages and fines. Many of the prescriptive insights gleaned from a close analysis of criminal law translate to the civil context as well by encouraging the law to separate the productive from the unproductive elements of lawbreaking.

For the purposes of our analysis, we will accept the common characterization of the dominant theories of punishment as either broadly deterrent or retributive.²¹⁰ By the former, we mean theories that are utilitarian in their orientation and that view the purpose of punishment as yielding optimal levels of criminality by creating disincentives that self-interested potential criminals will take into account in deciding whether the possible rewards of a criminal act outweigh the risk of punishment.²¹¹ By the latter, we refer to theories that identify the purpose of punishment as rooted in moral theories about culpability and just desert.²¹² While we decidedly do not intend to take sides as between these two approaches, our description of the appropriate legal response to property outlaws must vary depending on which theory one prefers. Our argument is premised on the general notion that certain categories of property outlaws are less culpable (or, in deterrent terms, create less social harm, or perhaps even create some social benefits) than ordinary criminals. Accordingly, we analyze a vari-

²¹⁰ See generally Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 594 (1996).

²¹¹ See *id.* at 602; see also Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 105 (2004).

²¹² See Bibas & Bierschbach, *supra* note 211, at 107; Kahan, *supra* note 210, at 601-02.

ety of ways in which both deterrent and retributive theories of punishment can (and at times actually do) take into account the productive aspects of lawbreaking in order to preserve the inherent dynamism that lawbreaking introduces within property law.²¹³

A. *Property Outlaws in Deterrent and Retributive Perspectives*

1. Deterrent Theories of Punishment

In the classic view, the ultimate goal of deterrent punishment ought to be something very close to zero incidence of the proscribed criminal behavior.²¹⁴ Some contemporary theorists have suggested a similar goal, at least as an (admittedly impossibly expensive) ideal.²¹⁵ Most recent utilitarian discussions, however, have abandoned the goal of zero crime in favor of punishment that seeks to achieve an “optimal” level of crime by forcing criminals to internalize the social costs of crime, including both the harm to victims and the costs of law enforcement.²¹⁶ These approaches treat the question of punishing crime as “a generalization of the economist’s analysis of external harm or diseconomies.”²¹⁷ Typically, the process of calculating the optimal level of utilitarian punishment is described as one involving some variation on a mathematical calculation linking, among other things,

²¹³ This risk is present whether one adopts a more formalist approach in which the outlaw is viewed as having broken an existing legal rule, with the law sometimes changing in response, or a more pluralist approach in which, as Cover might have said, the outlaw (or perhaps, for the pluralist, the “alt-law”), merely insists upon her own interpretation of the extant law, which the organs of official legal interpretation sometimes adopt as their own. Within the formalist framework, we would describe the law as having adopted a new rule in response to the outlaw’s defiance of the old one. Within a pluralist framework, we would describe the alt-law as having provided the occasion for official clarification of an ambiguous legal norm. In both cases, however, the outlaw/alt-law faces the same risk of punishment should she find herself on the losing side of the argument. Accordingly, whether styled as outlaw or alt-law conduct, our point about the need for flexibility in the (official) law’s response remains the same.

²¹⁴ See Keith N. Hylton, *Optimal Law Enforcement and Victim Precaution*, 27 RAND J. ECON. 197, 198 (1996).

²¹⁵ See, e.g., Jules L. Coleman, *Crimes, Kickers, and Transaction Structures*, in NOMOS XXVII, *supra* note 176 at 314 (“It would be nice if we could impose sanctions on criminal mischief such that the actor’s expected marginal cost of engaging in criminality was set equal to his expected marginal gain so that each criminal would have no good reason for preferring criminal activity to a non-criminal alternative.”).

²¹⁶ See Alvin K. Klevorick, *On the Economic Theory of Crime*, in NOMOS XXVII, *supra* note 176 at 292-93.

²¹⁷ Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 201 (1968).

the likelihood that a criminal will be caught with an aggregation of the harm to victims and enforcement costs generated by the sort of criminality in which she is engaged.²¹⁸

Our argument is that these calculations, whether framed in terms of general or specific deterrence, fail to consider or recognize the productive informational and redistributive potential of some kinds of legal transgression in spurring property law's evolution. By overlooking this potentially useful function, deterrent models of punishment are likely to call for levels of punishment that overdiscourage or preclude certain forms of lawlessness without recognizing that some elements of property lawbreaking may be more socially productive than others. Further, the general tendency of criminal law to overdeter property crimes is exacerbated when the technology of property law enforcement dramatically improves. Under such circumstances, levels of punishment that may have been appropriate at a time when the activity in question was relatively difficult to detect are especially likely to prove excessive.

What is the value of property lawbreaking that deterrent theorists have overlooked? Two categories are particularly significant. First, there may in certain situations be value in the outlaw's directly redistributive conduct. We refer to this broad category of utility gains as "redistributive value." As scholars have observed, property law contains several doctrines that permit forced transfers under certain circumscribed conditions where they are especially likely to be efficient.²¹⁹ Second, in cases of persistent, widespread lawbreaking, citizen behavior communicates vital information to the state, indicating that some element of a property law may be out of date or unjust in some respect that the political process has ignored. We refer to this signaling function provided by outlaw conduct as its "informational value." The information generated by outlaw conduct can, under the right circumstances, convince the state to reevaluate its commitment to an unjust status quo.

²¹⁸ See *id.* at 201; Hylton, *supra* note 214, at 198-99; A. Mitchell Polinsky & Steven Shavell, *The Optimal Tradeoff Between the Probability and Magnitude of Fines*, 69 AM. ECON. REV. 880, 880 (1979).

²¹⁹ See, e.g., RICHARD A. EPSTEIN, SKEPTICISM AND FREEDOM 98-100 (2003) (explaining the private necessity doctrine); Lee Anne Fennell, *Efficient Trespass: The Case for "Bad Faith" Adverse Possession*, 100 NW. U. L. REV. 1037, 1038 (2006) (arguing that adverse possession should be understood as a "doctrine of efficient trespass").

2. Retributive Theories of Punishment

In contrast to the forward-looking utilitarian approach, the retributive position centers not on the consequences of outlaw conduct but rather on the punishment the offender deserves in light of the moral character of his conduct.²²⁰ As Michael S. Moore has put it, “[r]etributivism is the view that punishment is justified by the moral culpability of those who receive it. A retributivist punishes because, and only because, the offender deserves it.”²²¹ From a broadly retributive point of view, the argument that certain categories of property outlaws should be tolerated (or subject to reduced sanctions) by the state relies on two intuitions: first, that as a general matter, those who nonviolently break property laws are less morally culpable than other types of lawbreakers; and second, that the violation of outdated laws or of laws that perpetuate unjust distributions of property is less blameworthy than other criminal acts and may even at times be justified. The first intuition is already embodied, albeit incompletely, in the criminal law, which tends to treat crimes against persons as much more serious than similar crimes against property.²²² The second intuition, which is similarly appealing, has not been as robustly incorporated into existing law.

The foregoing discussion suggests that retributive theorists would be far more interested in the (re)distributive justice of property outlaw behavior than in its information value. After all, the notion of informational value resonates more strongly with the consequentialist focus of deterrence theorists. Nevertheless, as we argue below, assuming a degree of punitive indeterminacy within retributive systems of punishment, the informational value generated by property outlaws can be relevant within retributive theories as well.

²²⁰ The “retributive” category obviously includes an enormous diversity of approaches to criminal punishment. For our limited purposes, we intend the category to refer broadly to all nonutilitarian approaches.

²²¹ Michael S. Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179, 179 (Ferdinand Schoeman ed., 1987).

²²² See *supra* Part I.C.

B. *The Types of Outlaws Revisited*

1. Acquisitive Outlaws

a. *Acquisitive Outlaws in Deterrent Perspective*

In the forward-looking prism of deterrence, the law is rightfully reluctant to incentivize disorder by loosening the punitive sanctions associated with property lawbreaking. In the absence of high transaction costs, utilitarians generally regard encroachments on property rights as socially wasteful rent seeking. Indeed, this analysis forms the principal basis for the most common utilitarian arguments against theft.²²³ Nevertheless, the case for involuntary transfers of property can be quite strong when there is reason to believe that the lawbreaker places a higher value on the property in question than the true owner and there is some obstacle to a consensual transfer between the parties. People who have nothing (or very little) will have limited means to express in market transactions the value they place on shifts in entitlements.²²⁴ Consequently, involuntary transfers may be one of the few options available to them. The difficulty lies in identifying situations where the lawbreaker truly does value the property more than the owner and in which the long-run effects of permitting occasional violations of the default rule against involuntary dispossession will not swamp the benefits created by permitting the transaction.²²⁵

Adverse possession law provides a useful illustration of this tension at work. In that context, the lawbreaker's long-term use (and improvement) of the property, combined with her risk of civil and criminal sanctions, will in many cases constitute strong *prima facie* evidence that she places an exceptionally high value on the prop-

²²³ See, e.g., Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224, 231 (1967) ("The theft itself is a pure transfer, and has no welfare cost, but the existence of theft as a potential activity results in very substantial diversion of resources to fields where they essentially offset each other, and produce no positive product."); see also Fred S. McChesney, *Boxed In: Economists and Benefits from Crime*, 13 INT'L REV. L. & ECON. 225, 227-28 (1993) (explaining and expanding upon Tullock's argument).

²²⁴ See Stewart Schwab, *Coase Defends Coase: Why Lawyers Listen and Economists Do Not*, 87 MICH. L. REV. 1171, 1178-79 (1989) (reviewing RONALD COASE, *THE FIRM THE MARKET AND THE LAW* (1988), and discussing wealth effects).

²²⁵ See Richard L. Hasen & Richard H. McAdams, *The Surprisingly Complex Case Against Theft*, 17 INT'L REV. L. & ECON., 364, 370 (1997).

erty.²²⁶ When these factors are coupled, as adverse possession requires, with a lackadaisical response by the true owner, the law achieves a high degree of confidence that the possessor values the property more than its absentee owner. The relative ease with which property owners can protect their rights and the heavy burdens placed on adverse possessors diminish the ancillary costs of creating such a mechanism for forced transfers.

But situations in which the rigorous requirements for adverse possession are met are not the only circumstances where the law might be justified in inferring that the lawbreaker places a higher value on property than its true owner does and in which the ancillary effects of recognizing the lawbreaker's claim fail to tip the balance. Traditional adverse possession law gains confidence from the failure of the true owner to step forward and enforce her property rights, thereby indicating that she places abnormally low value on the property. Comparable confidence may arise, however, when there is good reason to think that the nonowning claimant values the property at an abnormally *high* level in the absence of any countervailing evidence that the true owner places similarly exceptional value on the property. This might occur, for example, when the distribution of property rights is extremely skewed, the true owner is very wealthy, the acquisitive outlaw is very poor, and the presence of other conditions, like survival or a broader conception of necessity, weigh in favor of a legal reevaluation of entitlements. On a cold night, at least as a purely subjective matter, the homeless man almost certainly values the sheltered entrance to a large shopping center more highly than even the most attentive owners value their right to exclude him. He simply cannot communicate his preference in a way intelligible within a system of monetary valuation and consensual transactions. Under these and similar circumstances, utilitarian considerations would seem, as a *prima facie* matter, to call for the law to at least temporarily accommodate itself to the demands of the nonowner.

Apart from the direct redistributive value that results from certain involuntary transfers, pervasive and persistent acquisitive outlaw conduct can generate important and valuable information about the existence of possibly inefficient legal allocations of property rights. Concentrations of lawbreakers clustered around discrete legal entitlements might suggest that transaction costs or wealth effects are standing in the way of what would otherwise be an efficient transfer of

²²⁶ See Fennell, *supra* note 219, at 1040.

rights. In England, for example, it was common in the twentieth century for outdoors enthusiasts to trespass on private land as they “rambled” over the countryside. Such acquisitive outlaw conduct went on for decades, sometimes accompanied by expressive (or intersectional) forms of disobedience, until it caught the attention of the Labour Party, which ultimately responded by altering the nature of landowners’ rights to exclude rambles from “open” rural lands that did not implicate concerns for privacy.²²⁷ Particularly when their conduct is pervasive and protracted, acquisitive outlaw behavior generates an informational value above and beyond any redistributive value it may have. This informational value, however, has been largely disregarded in utilitarian discussions of nonconsensual transfers.

Of course, in the case of acquisitive outlaws, the quality of that information is undermined by the self-interested nature of the outlaw’s behavior. In the context of market transactions, an offer to give something up in order to consummate the purchase gives us fairly reliable information about the value the acquiring party places on a shift in legal rights, though this information is distorted by wealth effects.²²⁸ In the case of a forced transfer, however, we cannot tell from the outlaw’s conduct the extent to which she values a shift in entitlements, whether for the limited purpose of the specific transaction in question or more broadly through systematic legal change. The truth of two (at least) plausible assumptions, however, would reinforce the informational value of persistent, widespread outlaw conduct. First, in a well-functioning society, it is likely that most citizens possess an intrinsic willingness to obey the law, a willingness that is particularly pronounced when the law faithfully reflects broadly shared values.²²⁹ And

²²⁷ For a detailed discussion of the history of the British “right to roam” movement, see generally MARION SHOARD, *A RIGHT TO ROAM* (1999), and STEPHENSON, *supra* note 2.

²²⁸ Ronald Dworkin highlights the problems posed by this measure of value when he poses the hypothetical of a “poor, sick man [who] needs medicine and is therefore willing to sell a favored book, his sole source of pleasure, for the \$5 the medicine costs. His neighbor is willing to pay \$10 to have the book . . . because he is the famous (and rich) grandson of the author, and if he autographs the book he can sell it for \$11.” RONALD DWORKIN, *LAW’S EMPIRE* 286-87 (1986).

²²⁹ See AMITAI ETZIONI, *THE MORAL DIMENSION: TOWARD A NEW ECONOMICS* 58-63, 77 (1988) (arguing that the public choice school fails because its model does not adequately account for internalized values and moral commitments); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 65 (1990) (“People clearly have a strong predisposition toward following the law.”); FRANKLIN E. ZIMRING & GORDON J. HAWKINS, *DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL* 97 (1973) (“[T]he bulk of the population . . . have introjected the moral norms of their society [and] cannot commit crimes because

this seems true irrespective of the private gains citizens might derive from breaking the law, particularly when they perceive that the law is fair and is widely obeyed by their fellows.²³⁰ This assumption is not meant to deny the reality that some people may actually resemble the Holmesian “bad man.” For these, cold considerations of deterrence will be paramount.²³¹ Barring a widespread breakdown in the social order, however, most people will opt for market mechanisms of acquiring property and widespread lawlessness will convey important information. Second, consistent with the findings of behavioral economists, most people are less eager to pursue someone else’s property than they are to keep something they already possess.²³²

The combination of these two factors suggests that, as an initial matter, the behavioral balance is tipped in favor of departing from ex-

their self-concepts will not permit them to do so.”) (alteration in original) (internal quotations omitted); Ronet Bachman et al., *The Rationality of Sexual Offending: Testing a Deterrence/Rational Choice Conception of Sexual Assault*, 26 LAW & SOC’Y REV. 343, 367 (1992) (“We found that when the male’s behavior in the scenario was thought to be morally wrong, our respondents were unaffected by instrumental concerns of cost/benefit.”); Raymond Paternoster & Sally Simpson, *Sanction Threats and Appeals to Morality: Testing a Rational Choice Model of Corporate Crime*, 30 LAW & SOC’Y REV. 549, 579 (1996) (“[M]oral rules narrow the range of behavioral preferences by prescribing some as sacred. . . . When moral obligations weaken, compliance is based on perceived incentives and costs.”); Matthew Silberman, *Toward a Theory of Criminal Deterrence*, 41 AM. SOC. REV. 442, 455 (1976) (“‘Strongly socialized’ individuals . . . are less likely to engage in *all* types of offenses than individuals who are less morally committed. . . . [T]he threat of punishment is a more important factor in preventing the individual who is *less* morally committed from becoming involved in serious criminal activities than in preventing those who are more morally committed from becoming so involved, since the latter are not inclined to become seriously involved anyhow.”); Bradley R.E. Wright et al., *Does the Perceived Risk of Punishment Deter Criminally Prone Individuals? Rational Choice, Self-Control, and Crime*, 41 J. RES. CRIME & DELINQUENCY 180, 184 (2004) (“A restaurant owner can sell more prime rib by lowering its price, but not to vegetarian patrons.”). The empirical evidence in support of this particular view of the effect of criminal deterrence is, as with virtually every other theory of criminal deterrence, unsettled. See Wright et al., *supra*, at 189 (“It is clear that the position of classical deterrence theory that criminal motivation is constant is untenable, yet the exact causal significance of motivation still is not clear.”). Nevertheless, our view is at least a plausible one. See *id.* at 205-06 (acknowledging that the authors’ research is consistent with research showing that the deterrent effect of threats is irrelevant when moral beliefs are strong).

²³⁰ See TYLER, *supra* note 229, at 22; Kahan, *supra* note 210, at 603-04 (discussing the ways in which criminal law affects preferences for obedience to the law).

²³¹ See Wright et al., *supra* note 229, at 205-06 (“[V]iewing criminal behavior as costly and risky most deterred study members low in self-control and high in self-perceived criminality. In fact, at sufficiently low levels of criminal propensity, these threatened punishments may have no deterrent effect at all.”).

²³² See *supra* note 188 and accompanying text.

isting allocations of property only through legal, market-based transactions. That bias in turn suggests that when large numbers of people persistently engage in illegal actions aimed at shifting property entitlements away from the status quo, they are likely to be acting in response to fairly powerful incentives or objections. Widespread failure to resort to the market within a particular subgroup, or an intentional and coordinated strategy to shun the market, will therefore often suggest some sort of market failure or widely perceived injustice.²³³

None of this discussion is meant to suggest that we are unmindful of the potential costs involved. As rule utilitarians have frequently pointed out, any government decision to permit violations of general laws against forced transfers risks creating negative spillover effects that could easily swamp out any short-term gains achieved by a specific forced redistribution. The long-term negative side effects of permitting the activities of individual acquisitive outlaws could take several forms: first, permitting outlaws to either temporarily or permanently retain the property they seize might well encourage property owners to resort to violence to protect their property from the poor or to reduce productive investment in their property out of fear of losing it;²³⁴ second, tolerating forced acquisitions in one case might erode the general deterrent effect of the criminal law and encourage further acquisitive behavior in broadly analogous situations by opportunists with less compelling claims than the original lawbreakers;²³⁵ and, third, permitting lawbreakers to profit from their actions could more generally undermine respect for the rule of law.²³⁶

²³³ Tom Tyler has argued in a similar vein that willingness to break the law correlates strongly with views about the justice of society's distribution of wealth as well as views about legal legitimacy. TYLER, *supra* note 229, at 96, 107-08.

²³⁴ In part, this failure to invest might result from something analogous to the "demoralization" that Frank Michelman famously identified as one of the likely consequences of uncompensated government takings. See Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967). In part, however, it might also result from genuine uncertainty about the contours of property rights within a regime that would ratify the actions of acquisitive outlaws. See, e.g., Henry E. Smith, *Self-Help and the Nature of Property*, 1 J.L. ECON. & POL'Y 69, 88-91 (2005).

²³⁵ See *Southwark v. Williams*, 2 All E.R. 175, 179 (A.C. 1971) (arguing that permitting forced transfers based on claims of need would lead to claims by "others who would imagine that they [are] in need" or who "would invent a need" in an attempt to fit themselves within the rule).

²³⁶ *Id.* at 180 (arguing that "in the interest of law and order itself," courts must adopt a narrow interpretation of the necessity doctrine).

Of particular concern is the possibility that, over the long run, the general deterrent effects of permitting certain forced transfers will generate harmful feedback effects that actually magnify the harm caused by the illegal act, repercussions that would minimize the possibility that ratifying the forced transfer could be utility maximizing. For example, numerous adherents to the "Broken Windows" theory of criminal behavior have repeatedly hypothesized about the crime-amplifying effects of visible disorder.²³⁷ Permitting some forced transfers might conceivably contribute to such a feedback process, especially if the forced transfers were concentrated around neighborhoods already suffering from the effects of pervasive disorder.

Although these effects raise serious concerns and should not be treated lightly, none of them rules out in advance the possibility that if the utility gain from a forced transfer is great enough for a large enough number of people, legalizing certain categories of forced transfers, temporarily or permanently, can be a desirable solution. As Frank Michelman has observed, the nature and extent of owners' behavioral responses to "forced sharing" raise difficult empirical questions that cannot be determined a priori through abstract modeling.²³⁸ In other words, in cases of extreme want, it is possible that

²³⁷ The Broken Windows thesis was first raised in James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29 ("[I]f a window in a building is broken and is left unrepaired, all the rest of the windows will soon be broken. . . . [O]ne unrepaired broken window is a signal that no one cares, and so breaking more windows costs nothing."). The body of literature supporting the thesis is large, rapidly growing, and somewhat controversial. See, e.g., WESLEY G. SKOGAN, DISORDER AND DECLINE 9-14 (1990) (discussing how crime can be caused by disorder); Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1171, 1182 (1996) (arguing that public crime and public begging will lead to disorder through additional crime); Nicole Stelle Garnett, *Relocating Disorder*, 91 VA. L. REV. 1075, 1083 (2005) (arguing that eliminating disorder will curb crime as people see others behave lawfully); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 394 (1997) (concluding that a major factor in a person's decision to commit a crime is whether other people are committing crimes). But see Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 314-16 (2006) (concluding, after empirical analysis, that increased police attention to eliminate disorder and misdemeanor violations does not reduce crime); Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Window Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 386-89 (1998) (stating that the Broken Windows policy in New York has not played a significant role in reducing crime rates).

²³⁸ Frank I. Michelman, *Ethics, Economics, and the Law of Property*, in NOMOS XXIV, *supra* note 176 at 26-27; see also Smith, *supra* note 234, at 89 ("Ultimately, of course, the size of these various effects is an empirical question . . .").

permitting forced transfers to go forward will enhance utility, even over the long run.

Further, if the pressure for the particular type of forced transfer within a community is broad enough, legalizing the transfer may *increase* order and respect for the rule of law and for property rights by bringing the official law into greater conformity with people's sense of justice and fairness.²³⁹ For example, among squatting communities in the American West, the perception that federal land policy was patently unfair and unworthy of obedience threatened to undermine squatters' respect for the rule of law more broadly.²⁴⁰ Bringing the law of land distribution into conformity with the widely held views of the local community—by ratifying squatters' (illegal) appropriations—converted a group of outlaws into a group with something at stake in protecting the (modified) property system.

A similar intuition appears to underlie the arguments made by Hernando de Soto with respect to the benefits of granting title to squatters in Lima, Peru.²⁴¹ In Peru, where the mass of people are cut off from property ownership by their own poverty, residents have frequently resorted to concerted land invasions to occupy underutilized land, both public and private.²⁴² As de Soto observes, "people are capable of violating a system which does not accept them, not so that they can live in anarchy but so that they can build a different system which respects a minimum of essential rights."²⁴³ De Soto observes that 69 of 100 houses built in Lima in 1985 were constructed on unlawfully occupied land.²⁴⁴ Under the circumstances de Soto describes of widespread rejection of the existing distributive order, ratifying the conduct of property outlaws—or accommodating them by creating a formalized process by which they can accomplish the goal of ownership—is ultimately an order-enhancing, not an order-destroying, strategy.

²³⁹ See TYLER, *supra* note 229, at 96, 107-08 (noting that fair procedures have a legitimizing effect on legal authorities); ZIMRING & HAWKINS, *supra* note 229, at 220-21 (noting that the threat of punishment for behavior widely viewed as justified within a particular community can lead to an overall deterioration of respect for the rule of law).

²⁴⁰ See GATES, *supra* note 25, at 235 (stating that, during the 1830s, squatters were indirectly encouraged to take more land when the government forgave past squatters).

²⁴¹ HERNANDO DE SOTO, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* 23-26 (1989).

²⁴² *Id.* at 19-22.

²⁴³ *Id.* at 55.

²⁴⁴ *Id.* at 23.

For the same reason, how others respond to a system of forced sharing will depend on the precise means by which that sharing is accomplished. Not all lawbreaking, even of the acquisitive (or intersectional) variety, need contribute to a sense of widespread disorder that would undermine broader crime-control efforts. Unlike broken windows, an act of appropriation may actually contribute to visible order.²⁴⁵ Squatters in the American West created elaborate (and ordered) systems of informal law to protect their investments should their legality some day be recognized.²⁴⁶ Similarly, de Soto has observed that organized squatters in Peru often keep meticulous land records indicating who “owns” which parcel and take great pains to defend their informal property rights against owners and “ordinary criminals.”²⁴⁷ The highly organized nature of much urban squatting in the United States in the 1980s likewise may well have worked to *displace* the preexisting disorder generated by extensive urban abandonment.²⁴⁸ Urban squatters were fixing broken windows, not breaking them.²⁴⁹ It is perhaps for this reason that neighborhood residents were typically supportive of squatting efforts, notwithstanding their illegality.²⁵⁰

b. *Acquisitive Outlaws in Retributive Perspective*

It is commonplace within theories of civil disobedience to distinguish between conscientious disobedients who violate laws with the self-conscious purpose of drawing attention to the injustice of the laws they oppose and mere criminals motivated by greed or selfishness. Dworkin’s theory of civil disobedience, for example, actively privileges

²⁴⁵ See Kahan, *supra* note 237, at 369 (emphasizing that it is “visible” disorder that undermines community efforts to control crime). Property owners’ responses to such appropriation, however, might well contribute to such visible signs of disorder.

²⁴⁶ See JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 25-26 (4th ed. 2006) (quoting JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 3-5 (1956)).

²⁴⁷ DE SOTO, *supra* note 241, at 27-29.

²⁴⁸ See, e.g., MELE, *supra* note 124, at 197 (observing that abandoned urban properties became zones of criminality); Borgos, *supra* note 133, at 428-29, 433-36 (describing neighborhood support for ACORN Housing’s squatting actions, which helped to clean up otherwise derelict housing).

²⁴⁹ A similar story can be told about the Green Guerrillas, 1970s activists who trespassed on abandoned, rubble-strewn properties in New York City to create community gardens. See MELE, *supra* note 124, at 208-10; Liz Christy Community Garden, <http://www.lizchristygarden.org> (last visited March 23, 2007) (describing the creation of one community garden in New York by the Green Guerrillas).

²⁵⁰ See MELE, *supra* note 124, at 208 (noting that squatters and homesteaders enjoyed community support).

conscientious lawbreakers (who overlap substantially with our own category of expressive lawbreakers) over other types of criminals.²⁵¹ Indeed, for him, the principal difference between the most justified and least justified forms of civil disobedience turns on the degree of intensity with which the disobedient citizen views the law as unjust.²⁵² Accordingly, on his view of civil disobedience, many of the people we have called acquisitive lawbreakers would not fare particularly well. Their subjective motivation, while often a mystery, frequently appears to be little more than a self-interested desire to acquire property rights currently in the hands of others.

The central message sent by the acquisitive lawbreaker's actions is that another person owns something that she wants (or needs) for herself but that she will not (or cannot) purchase in a voluntary transaction. In most cases, this desire for the property of another will be unworthy and unjustified, and society correctly responds to the lawbreaker's behavior by punishing her for her transgression. But, as we have shown, at times external conditions might call into question, or at least lead us to soften, our reflexive tendency to penalize the lawbreaker.

In contrast with Dworkin, we believe that the justification of an act of acquisitive lawbreaking can turn on the objective content of the law and the facts on which the law itself operates, and not just on the subjective attitude of the lawbreaker herself. In so doing, we draw on a long, though neglected, tradition within western thought. Early Christian thinkers, for example, viewed the failure of the rich to share with the poor as tantamount to theft.²⁵³ Thomas Aquinas built on this tradition, arguing that when a poor person takes what he needs from the "superabundance" of another, he is simply taking that to which he is already morally entitled and, as a consequence, he does not commit the crime of theft.²⁵⁴ Indeed, in the thirteenth century, canon lawyers believed that the destitute were permitted to complain to their bishop when local elites failed to comply with their duty to share their re-

²⁵¹ See DWORKIN, PRINCIPLE, *supra* note 163, at 108-10; RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 206-16 (1977).

²⁵² DWORKIN, PRINCIPLE, *supra* note 163, at 107-08.

²⁵³ See CHARLES AVILA, OWNERSHIP: EARLY CHRISTIAN TEACHING 55 (1983).

²⁵⁴ See ST. THOMAS AQUINAS, SUMMA THEOLOGIAE II-II, at Q. 66, art. 7, *reprinted in* ON LAW, MORALITY, AND POLITICS 187 (William P. Baumgarth & Richard J. Regan eds., 1988) ("It is not theft, properly speaking, to take secretly and use another's property in a case of extreme need because that which a man takes for the support of his life becomes his own property by reason of that need.").

sources with the poor.²⁵⁵ The bishop could then compel the wealthy to give alms, using the threat of excommunication if necessary.²⁵⁶ More recently, Jeremy Waldron has endorsed a redistributive principle that “[n]obody should be permitted ever to use force to prevent another man from satisfying his very basic needs in circumstances where there seems to be no other way of satisfying them.”²⁵⁷ And within modern criminal law, analogous intuitions appear to underlie the justificatory doctrine of necessity, although in practice the doctrine has been so hemmed in by qualifications and exceptions as to make it virtually inoperative in circumstances of economic need.²⁵⁸

It is important to note that, unlike the dominant theories concerning civil disobedience, the subjective attitude of the acquisitive outlaw with respect to the justice of the violated law is not the most relevant factor in this analysis. Calling the lawbreaker’s action an act of selfishness, even if true, does not necessarily undermine its justification under these necessity inquiries. Instead, what matters is whether, as a question of objective distributive justice, she took what she badly *needed* from the superabundance of another in such a way that her actions avoided an even greater evil. Someone in dire need is certainly not justified in taking from someone else in dire need. The outlaw’s subjective view regarding the objective injustice of the existing property distribution, however, is not the crucial factor.²⁵⁹

There are, obviously, many pragmatic reasons for preferring legislative solutions to distributive problems over the often unreflective self-help of the acquisitive outlaw.²⁶⁰ From a retributive point of view, these consequences are not an appropriate consideration in answering the narrow question of the justice of an individual outlaw’s behavior when the legislature has failed to act. All things being equal, however, even a nonutilitarian could favor the rectification of the injustice that justifies the outlaw’s behavior through the most efficient means

²⁵⁵ See JEAN PORTER, *NATURE AS REASON: A THOMISTIC THEORY OF THE NATURAL LAW* 357 (2005).

²⁵⁶ See BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW AND CHURCH LAW* 1150-1625, at 69-72 (1997).

²⁵⁷ JEREMY WALDRON, *LIBERAL RIGHTS: COLLECTED PAPERS 1981-1991*, at 240-41 (1993).

²⁵⁸ See *infra* notes 318-332 and accompanying text (discussing the limitations on the doctrine of necessity).

²⁵⁹ This is not to say that the lawbreaker’s subjective intent is absolutely irrelevant. See, e.g., Mitchell N. Berman, *Lesser Evils and Justification: A Less Close Look*, 24 *LAW & PHIL.* 681, 701-04 (2005) (discussing the problem of mistaken necessity).

²⁶⁰ See WALDRON, *supra* note 257, at 243-45.

possible.²⁶¹ Accordingly, even a nonutilitarian can appreciate the informational value generated by acquisitive outlaws, because the information they generate might point toward previously overlooked distributive injustices in need of legislative attention.

Even assuming the justice of acquisitive actions under the most extreme circumstances of need, the more interesting question is whether there is an argument that the category of justified acquisitive conduct extends beyond the situation of the person in immediate need of sustenance for her physical survival. We limit ourselves to the observation that there are plausible theories of distributive justice that would be amenable to permitting some additional room for self-help beyond the extreme case of, say, imminent starvation. In large part, the question turns on the breadth of one's definition of "necessity." Many people would admit the validity of some acquisitive actions in order to fulfill basic human needs but then argue for an extremely narrow understanding of "need" as encompassing only those items necessary to sustain physical survival.²⁶² In an affluent society like ours, the number of people who might need to engage in criminal violations of property laws in order to stave off imminent physical harm attributable to poverty is likely to be very small, though not trivial.²⁶³ And in a highly unequal developing world society, the numbers will be even larger.²⁶⁴

²⁶¹ See *id.* at 244 ("The welfare state is a way of ensuring that no one should ever be in such abject need that he would be driven to violate otherwise enforceable rules of property.").

²⁶² This is apparently also the position of the Catholic Church. See Catechism of the Catholic Church para. 2408, available at <http://www.vatican.va/archive/catechism/p3s2c2a7.htm#II> (last visited March 23, 2007) (stating that it is not a violation of the Seventh Commandment to steal property in cases of urgent necessity).

²⁶³ A search of public records and news reports for the past decade turns up nearly 100 reported homeless deaths from exposure, a figure that almost certainly undercounts the actual number. See Spreadsheet of Homeless Deaths (on file with authors). For newspaper articles describing deaths of homeless persons due to exposure, see Juliet V. Casey, *Homeless in Las Vegas: On a Mission of Mercy*, LAS VEGAS REV. J., Aug. 15, 2005, at 1B; Greg Garland, *Two Homeless Dead After Overnight Exposure*, BALT. SUN, Dec. 4, 2005, at B1; *Helping the Helpless*, ARIZ. REPUBLIC, Sept. 7, 2005, at B8; Robert F. Moore & Bill Hutchinson, *The Killer Chiller*, DAILY NEWS (New York), Jan. 19, 2005, at 5; Michelle O'Donnell & Anahad O'Connor, *Wind and Cold Are Blamed in Three Deaths*, N.Y. TIMES, Jan. 16, 2006, at B1; Paul Rubin, *Crying Shame*, PHOENIX NEW TIMES, Oct. 6, 2005, available at http://www.phoenixnewtimes.com/Issues/2005-10-06/news/feature_print.html; Annie Sweeney, *Lightning Strikes Thrice as Weather Gets Weird*, CHICAGO SUN-TIMES, Jan. 13, 2005, at 8; Pamela White, *Ominous Forecast: Rising Homelessness, Falling Temps, and Looming Deaths*, BOULDER WEEKLY, available at <http://www.boulderweekly.com/archive/11290/controversy.html> (last visited Mar. 23, 2007).

²⁶⁴ See, e.g., DE SOTO, *supra* note 241, at 19-22.

But many theorists have argued for a broader understanding of needs. Thinkers as diverse as Aristotle,²⁶⁵ Adam Smith,²⁶⁶ John Ryan,²⁶⁷ and, more recently, Amartya Sen²⁶⁸ have, for example, agreed that the category of human needs extends well beyond the basket of goods necessary to stave off starvation and exposure. In particular, they have focused on the intuition that, as social animals, human beings' legitimate "needs" include the property necessary to facilitate a minimally acceptable degree of participation in the social life of their respective communities.²⁶⁹ Given the differences in material circumstances of various communities and, accordingly, the different material preconditions for effective social participation, this understanding of necessity is likely to yield different concrete definitions of need for differently situated societies.²⁷⁰

As Smith put it in his *Wealth of Nations*, the category of "necessaries" includes "whatever the custom of the country renders it indecent for creditable people, even of the lowest order, to be without."²⁷¹ Smith gives the example of leather shoes, a commodity that might be viewed as a luxury or perhaps as an eccentricity in other cultures, but that was a minimum requirement for even the most basic level of social respectability in Smith's England.²⁷² Building on Smith's culturally relative definition of needs, Sen has proposed a definition of poverty that considers the material commodities necessary to permit a person to both survive physically and to participate, at least at some minimal level, in the life of the community.²⁷³

²⁶⁵ See Martha Nussbaum, *Nature, Function, and Capability: Aristotle on Political Distribution*, in OXFORD STUDIES IN ANCIENT PHILOSOPHY 145, 149-50, 157 (Julia Annas & Robert H. Grimm eds., Supp. 1988) (describing Aristotle's view that all people should be given the necessary resources to "liv[e] well").

²⁶⁶ See ADAM SMITH, *THE WEALTH OF NATIONS*, at Bk. V, ch. ii, pt. 2 (Edwin Cannan ed., Random House 1937) (1776) (arguing that an increase on taxes of necessary items must be accompanied by an increase in wages to compensate).

²⁶⁷ JOHN RYAN, *A LIVING WAGE* 72-74, 126-27 (1906).

²⁶⁸ See AMARTYA SEN, *RESOURCES, VALUES, AND DEVELOPMENT* 325-45 (1984) (describing the merits of an absolutist approach to poverty).

²⁶⁹ See WALDRON, *supra* note 257, at 246-47 (arguing that there may be a moral duty for welfare provision).

²⁷⁰ See *id.* at 247 ("The goods . . . that are necessary for basic interaction with others may vary from society to society; but it may well be true that in each society those goods are so important to the social side of human existence that men and women will . . . strive for them . . .").

²⁷¹ SMITH, *supra* note 266, at 821.

²⁷² *Id.* at 822.

²⁷³ SEN, *supra* note 268, at 336-37.

If we employ this metric while shifting our attention away from subsistence economies, the commodities necessary to participate minimally in the life of a community are likely to expand.²⁷⁴ Presumably in some communities, a loin cloth, some tools or weapons, and a makeshift shelter would be sufficient to be a member of the community in good standing. A comparable list for life in the twenty-first century United States would include substantial quantities of clothing, a fairly sophisticated shelter with indoor plumbing and access to various utilities (electricity, gas, telephone service), a series of functional household appliances, and an effective means of transportation.²⁷⁵

As a community becomes more affluent, the list of commodities needed to participate in community life tends to expand. This is why items that were once regarded as luxuries, such as indoor plumbing, are now considered to be minimal requirements of habitability and why, notwithstanding its onetime status as a luxury item, we are justified in continuing to refer to housing that lacks indoor plumbing (and even to much housing that has it) as unacceptably “poor.”²⁷⁶

To a limited extent, existing law recognizes the importance of this expanding list. For example, landlord-tenant law permits tenants to engage in self-help, through, for example, refusing to pay rent or deducting the cost of certain essential repairs from rent, when landlords fail to maintain properties at an adequate level.²⁷⁷ And the circumstances that would justify such a refusal to pay rent encompass features

²⁷⁴ See *id.* at 336 (“For a richer community . . . the nutritional and other physical requirements . . . are typically already met, and the needs of communal participation . . . will have a much higher demand in the space of commodities and that of resources.”); see also Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237, 1261 (2005) (urging that the level of resources necessary to enjoy the opportunities associated with freedom “may vary enormously from society to society”).

²⁷⁵ For an example of the “necessity” of telephone service, see Julia Sommerfeld, *Voice-mail Service for Homeless Will Expand*, SEATTLE TIMES, Sept. 8, 2003, at B3.

²⁷⁶ This explains why arguments that the poor are materially well off in comparison to the poor of the last century often come off as incurably obtuse. In addition, the notion of a shifting list of commodities necessary to participate in community life is consistent with the observations by behavioral economists that people exhibit strong preferences regarding their relative position in society with respect to certain “positional goods” such that they are willing to forego a degree of absolute consumption in order to retain a favorable relative ranking. For a clear summary of this finding, see Robert H. Frank, *Positional Externalities Cause Large and Preventable Welfare Losses*, 95 AM. ECON. ASS’N PAPERS & PROC. 137, 137 (2005).

²⁷⁷ See SINGER, *supra* note 246, at 716-18 (discussing actions tenants are entitled to take when landlords fail to maintain their property).

of residential property, such as running water and heat, that would have been viewed as housing luxuries a century ago.²⁷⁸ Unfortunately, the legal protection of an individual's ability to affirmatively receive most of these services is inadequately protected by existing law.²⁷⁹

Extending Sen's context-specific definition of "need" to the question of self-help, one could plausibly argue that the propertyless person is entitled to take for herself from the property of others reaches somewhat beyond that necessary to sustain physical existence and includes at least some of those commodities needed to permit a minimal participation in the life of the community. This assertion sounds fairly radical in the abstract. Nevertheless, doctrines like the implied warranty of habitability, adverse possession, and necessity suggest that self-help redistribution is already accepted, in a circumscribed way, by current property doctrine. As we discuss at greater length below, we are not necessarily calling for the creation of new legal categories so much as the expansion of existing tools. The necessity doctrine, for example, need not encompass every element of the expanded list of needs. After all, on most accounts, the entitlement protected by the doctrine does not guarantee the right to avoid any need at all, but only "dire" or some similarly qualified need. Still, a broader understanding of human need would justify expanding the prerequisites for an assertion of necessity beyond a showing of imminent physical harm.

2. Expressive Outlaws

a. *Expressive Outlaws in Deterrent Perspective*

Expressive outlaws present utilitarian theorists with a different calculus, in large part because of the relative modesty of their demands. They do not seek to take possession of someone else's property for themselves. Indeed, because expressive outlaws are not attempting to acquire property for themselves, they have fewer incentives—aside from a desire to express their legal preferences—to engage in the lawbreaking activity to begin with. As Eric Kades has argued, their

²⁷⁸ See *id.* at 715 (describing circumstances that can give rise to this right of self-help).

²⁷⁹ The protection provided by landlord-tenant law, for example, only applies to parties who have already successfully established a contractual landlord-tenant relationship. It says nothing about an affirmative entitlement to any of these goods apart from such a preexisting relationship.

willingness to risk injury or jail in order to express their dissent therefore suggests that they place an exceptionally high value on changing the legal status quo.²⁸⁰ Moreover, the visibility they bring to what may have been a sublimated legal disagreement (for example, the myth of black acquiescence in the private segregation of the Jim Crow South) means that their activities generate information for those in political power. And, unlike acquisitive outlaw conduct, this information is not tainted by the same degree of material self-interest.²⁸¹ Finally, because expressive outlaws are typically organized, their activities may not contribute to the same extent as decentralized acquisitive outlaw behavior to an increase in visible disorder that could undermine respect for the rule of law among the general population. The lunch-counter sit-in protesters, for example, were nothing if not orderly, as even some of their opponents conceded.²⁸²

But a rigorous examination of the expressive outlaw requires recognition of a paradoxical caveat: to legitimize, *ex ante*, the lawbreaker's activity would radically undermine the expressive message itself.²⁸³ That is, part of the message is intrinsically tied to its status as disobedience; to legitimize the disobedience would therefore dilute, and even counteract, the message's vitality.²⁸⁴ Accordingly, while we advocate a reevaluation, *ex post*, of the proper level of punishment of expressive outlaws, we remain cognizant of the expressive value that is generated by the lawbreaker's willingness, *ex ante*, to accept punishment, and thus are reluctant to advocate a prospective rule change.

Given the intrinsic link between the illegality of their conduct and the quality of the information that conduct sends, it is not clear that generally applicable and substantive legal accommodation is a desirable response to expressive outlaws, even from the point of view of the outlaws themselves. It is therefore not surprising, for example, that many of the lunch counter sit-in protesters specifically wanted to be jailed and in some cases even objected when judges proposed to sus-

²⁸⁰ See Kades, *supra* note 17, at 22-25.

²⁸¹ See *id.*

²⁸² See *supra* note 207 and accompanying text.

²⁸³ See Kades, *supra* note 17, at 22-25.

²⁸⁴ See *id.*; Steven M. Bauer & Peter J. Eckerstrom, Note, *The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience*, 39 STAN. L. REV. 1173, 1189-91 (1987) (arguing that legitimizing civil disobedience through the necessity defense may rob it of the "strategically important" symbolism associated with accepting punishment).

pend their sentences.²⁸⁵ The converse was also true, and opponents of civil rights were sometimes eager to avoid enforcing the law against protesters in order to deny them the platform created by acts of civil disobedience.²⁸⁶ As Kades correctly puts it, “[i]f it is the illegal nature of civil disobedience that grabs the attention of the rulers, then eliminating all sanctions will render the tactic less effective.”²⁸⁷ However, as Kades further points out, this logic does not preclude substantially lightening the punishment meted out to expressive outlaws.²⁸⁸ Expressive lawbreakers do appear to generate less social harm than the typical criminal. Any utilitarian accommodation of expressive outlaws would, however, seek to minimize harm to property owners, while preserving the expressive value of the disobedience itself.

b. *Expressive Outlaws in Retributive Perspective*

The retributive justification for expressive violation of criminal laws is, to a certain extent, less controversial than the case for acquisitive outlaws. As Dworkin puts it, “Americans accept that civil disobedience has a legitimate if informal place in the political culture of their community.”²⁸⁹ Much of the standard rationale for tolerating classic manifestations of civil disobedience stems from a widespread recognition of the importance of conscience to individual autonomy. Dworkin, for example, argues that lawbreaking is most easily justified when it is expressive of the view that one is being compelled by the law to perform what one conscientiously believes to be a deeply immoral or unjust act.²⁹⁰

Daniel Markovits goes further than Dworkin, arguing that intentional lawbreaking can be acceptable even in the absence of strongly held belief in the deep injustice of existing law. Indeed, he argues that outlaw behavior is “an unavoidable, integral part of a well-

²⁸⁵ See *Two Sentenced for Trespassing*, GREENSBORO DAILY NEWS, Apr. 27, 1960, at A4; see also LEWIS & D’ORSO, *supra* note 71, at 110 (describing the strategic importance of actually going to jail rather than paying a fine).

²⁸⁶ Kades tells the story of one southern mayor who “secretly paid Martin Luther King, Jr.’s fine for trespass, and busted him from jail against his will.” Kades, *supra* note 17, at 35 n.99.

²⁸⁷ *Id.* at 35.

²⁸⁸ See *id.* at 29-36.

²⁸⁹ DWORKIN, PRINCIPLE, *supra* note 163, at 105.

²⁹⁰ See *id.* at 107-14 (contrasting “integrity-based” civil disobedience, which most agree justifies law breaking, with “justice-based” and “policy-based” civil disobedience, which are more problematic).

functioning democratic process” when it is employed to expose and overcome “democratic deficits” caused by inertia built into the democratic political process.²⁹¹ Consistent with his majoritarian theory of legal obligation, Markovits limits the scope of permitted “democratic disobedience” to situations in which the act of legal defiance expresses a view that has “significant support among the citizenry” but that has been held in check by the inertia of the democratic process.²⁹² Disobedience that lacks such majoritarian support cannot persist in the face of a clear expression of majority support for the legal status quo.²⁹³

Although we welcome Markovits’s broader view of the acceptable scope of expressive lawbreaking, we would go still two steps further. In our view, expressive lawbreaking represents an important part of the political process even in the absence of the democratic deficits that arise when the law fails to reflect already-existing majority sentiment. Instead, we view such lawbreaking as having as a legitimate goal the creation of majority sentiment where none existed before. As Cover understood, allowing groups concretely to live out their alternative legal conceptions uniquely fosters the normative diversity that is essential to life in a free society.²⁹⁴ Though not all such expressive lawbreaking need ultimately be embraced by the official lawmakers, its social value provides a reason to create space for such expression, at least to a certain extent. By living out an alternative vision of legal possibility, lawbreaking can help to overcome what might be called “imaginative deficits” that may well prevent majorities from embracing previously unexplored shapes that law might take. As we have already argued, the ability of lawbreaking to demonstrate the range of imaginative legal possibilities beyond the parameters of existing democratic debate is particularly (though not exclusively) strong for those who intentionally violate property laws (as opposed to other sorts of laws). This is because, as a result of its subject matter, violations of property law have a unique ability to demonstrate in a very concrete way alternative conceptions of legal possibility.²⁹⁵

Even beyond its imaginative power, however, the formal ratification of concerted illegality can play an important role in protecting

²⁹¹ Markovits, *supra* note 166, at 1927-36.

²⁹² *Id.* at 1938-39.

²⁹³ *Id.* at 1941.

²⁹⁴ Cover, *supra* note 169, at 15-17, 32-35.

²⁹⁵ See *supra* Part II.D.

minorities against majoritarian tyranny. When a minority group demonstrates the intensity of its preference for legal change through an embrace of illegality in the face of a policy supported by only the most apathetic of majorities, fairness arguably favors legal change, notwithstanding the persistent absence of majority support for affirmatively implementing such a change. Under these circumstances, the best solution might be to put the strength of majority sentiment to the test (that is, to gauge its ability to overcome the inertial forces Markovits describes) by providing the opportunity for legislative override of the requested legal accommodation. Such a move would reverse the direction of the inertial forces to determine whether mildly favorable majority sentiment can summon up the energy to reassert itself in favor of the old rule.²⁹⁶

It is important to note that a significant part of the reduced culpability associated with expressive disobedience, at least as compared with revolutionary action, stems from the civil disobedient's implicit affirmation of the democratic legal system through her voluntary submission to criminal punishment for her unlawful acts. In other words, expressive outlaw conduct affirms the authority of the community's legal system even as it forcefully challenges one particular aspect of that system. However, while it seems clear that expressive lawbreakers are less blameworthy than other sorts of criminals, it is not clear that the proper response to their reduced culpability is a complete elimination of criminal liability, as opposed to, for example, reduced punishment or targeted relief after the fact. We will discuss several possible responses the law might have to the conduct of expressive outlaws in Part III.C.

3. Intersectional Outlaws

a. *Intersectional Outlaws in Deterrent Perspective*

By definition, intersectional outlaws demonstrate features characteristic of both expressive and acquisitive outlaws, for better and for worse. For example, like acquisitive outlaws, their desire to actually obtain possessory or quasi-possessory interests for themselves gives intersectional outlaws an incentive to search for owners who place a low value on excluding people from engaging in the sorts of uses that intersectional outlaws value. On the other hand, their desire to make

²⁹⁶ Cf. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 16-30 (1982) (describing strategies for coping with "legal petrification").

an expressive impact can sometimes push intersectional outlaws to seek out property owners likely to raise vociferous and visible objections to their activities. Accordingly, in some situations, evaluating the utility gain, if any, from granting intersectional outlaws the property interest they seek will require the same analysis that would be used for acquisitive outlaws. In other cases, those from which intersectional outlaws derive the greatest expressive impact, the analysis of the gain, if any, will proceed along the lines used for expressive outlaws.

When it comes to the spillover effects of tolerating outlaw behavior, intersectional outlaws demonstrate the same bifurcation. On the one hand, their interest in enjoying the property entitlement they seek to change makes their less expressive conduct somewhat more sensitive than that of expressive outlaws to the potentially negative side effects caused by toleration of outlaw behavior. That is, reduced state repression of the self-interested component of intersectional lawbreaking may substantially increase the incentives of other intersectional and acquisitive outlaws to engage in the same behavior. On the other hand, the more focused, coordinated, and expressive their interest in opposing particular property entitlements, the more likely intersectional outlaws are to resist state enforcement of existing property rights.

When expressive outlaw conduct is combined with circumstances suggesting an efficient forced transfer, there seems to be little reason to treat intersectional outlaws differently than acquisitive outlaws under analogous circumstances. On the other hand, they may be entitled to more favorable treatment, particularly when the intersectional outlaw undertakes self-help redistribution on behalf of a third party. Such a Robin Hood-style outlaw arguably provides all the utility gains of justified self-help redistribution while, because she will not personally profit from the redistribution, also providing high-quality information about the intensity of her commitment to a shift in the legal status quo.

b. *Intersectional Lawbreakers in Retributive Perspective*

From a retributive point of view, intersectional outlaws present the same interesting hybrid of the two primary categories of property outlaws. However, to the extent that intersectional outlaws' expressive activity is acquisitive, its expressive component does not substantially alter the analysis under the redistributive principle discussed above. The fact that an action is expressive does not entitle an acquisitive outlaw to appropriate the necessities of others, or to acquire others' sur-

plus property for nonessential purposes. In addition, the more the motive of the acquisitive behavior moves away from satisfying immediate needs (either of the intersectional outlaw or of others), and the more it moves towards the expressive end of the spectrum, the less likely it is that the “speaker” will be entitled to avoid (or be interested in avoiding) some criminal sanctions for her conduct.

C. *Legal Responses to Property Outlaws*

Our principal purpose in this Article has been to highlight the importance of certain categories of intentional property lawbreaking to the process of property law’s evolution. In particular, we wanted to bring to the forefront two neglected values generated by some intentional property lawbreaking—what we have called lawbreaking’s redistributive value and its informational value. Given the power of these two values, we argue for a reconfiguration of sanctions in certain contexts. This does not mean that sanctions are always (or even usually) inappropriate; indeed, as we have already argued in the context of our discussion of expressive outlaws, their willingness to face the imposition of legal penalties is part and parcel of the outlaw’s expressive force.

We are concerned that, in its strategies of punishment, the law may aim to preclude too much property lawbreaking. As we have argued, the law must take into account the possible socially productive nature of some property lawbreaking, not just its social costs. In fact, total deterrence does not appear to be the goal of most contemporary theorists.²⁹⁷ Moreover, at least in practice, the degree and likelihood of punishment for most property law violations have left sufficient play in the joints of the system to permit some kinds of intentional lawbreaking to lead to significant legal change.

The dynamically evolving technologies and strategies of law enforcement, however, constantly threaten to remove the needed flexibility within the enforcement of property laws. In crafting their responses to property outlaws, decision makers must therefore pay careful attention to these shifts in the technology or strategy of law enforcement that dramatically increase the risks of property lawbreaking. When enforcement becomes cheap, easy, and pervasive through the advent of new technology, preexisting legal responses can easily

²⁹⁷ See *supra* note 216 and accompanying text (noting theorists’ desire not to overdeter property crimes because such crimes may be socially productive).

become excessive; particularly in cases where the law previously engaged in only sporadic enforcement. If too effective at deterring crime, inadvertently harsh (or definite) sanctions can stamp out the information benefits that result from some property lawbreaking. In short, dramatic improvements in the ability to detect and punish property lawbreaking have the ability to shift the potential outlaw's calculus in significant ways, not all of which are socially beneficial.

This focus on the possible improvements in the technology of property enforcement to suppress productive lawbreaking is particularly crucial in the context of intellectual property, where the technology (and policy) of property enforcement is presently experiencing revolutionary change. But our point is a general one that, as our discussion of adverse possession below demonstrates,²⁹⁸ applies with equal force in the context of tangible property. Of course, there are reasons to doubt that the deterrent force of some criminal punishments, such as those accompanying most trespass statutes, could possibly be excessive because they are misdemeanors accompanied in practice (at least in this country) by relatively light punishments.²⁹⁹ In some cases, however, even nonviolent trespassing protesters have been made to suffer harsh penalties through creative prosecution.³⁰⁰ In other instances, particularly those involving expressive behavior, injunctions and contempt sanctions have dramatically increased the penalties for even minor property crimes. In addition, the ancillary effects of criminal convictions of *any* sort, such as reputational and professional harm, can magnify the force of even minor criminal sanctions.³⁰¹ Finally, outside of the specific context of trespass, punishment for minor property crimes can, with the application of "three strikes" laws, RICO, and similar laws targeting organized or repeat offenders, lead to the imposition of harsh sentences that might cause

²⁹⁸ See *infra* Part III.C(1)(a)(1).

²⁹⁹ See, e.g., N.Y. PENAL LAW §§ 140.10, 140.15 (McKinney 1999) (defining most criminal trespass violations as misdemeanors in New York).

³⁰⁰ In the United Kingdom, nonviolent trespassers advocating the "right to roam" were, in one famous case, sentenced to over a year in prison through the creative use of criminal statutes. See HOWARD HILL, FREEDOM TO ROAM 67-68 (1980). Even misdemeanor criminal trespass can carry sentences of up to a year in prison. See N.Y. PENAL LAW § 70.15. And protesters convicted of trespassing on federal military installations can be sentenced to up to six months in federal prison. 18 U.S.C. § 1382 (2000).

³⁰¹ Cf. Coleman, *supra* note 215, at 337 (discussing the powerful deterrent effect of probation).

even someone in the most dire and uncontroversial situation of necessity to think twice before violating the property rights of others.³⁰²

When confronted with a pattern or movement of pervasive and protracted property lawbreaking, legislators and prosecutors can respond by ratcheting up penalties in an effort to get ahead of the deterrence curve. That increased repression often takes the form of enhanced sentences, but it can also occur by means of increased certainty of law enforcement, as prescribed, for example, by the social influence theory of criminal behavior.³⁰³ Although the strategies of heightened penalties and heightened enforcement are not inherently inconsistent, they are often presented as alternatives.³⁰⁴ A third possibility, typically overlooked, is to ratify pervasive property lawbreaking through legal accommodation.

We suspect that most legislators unthinkingly favor the option of increased repression, primarily in the form of longer sentences, over the possibility of legal reform such as increased economic redistribution.³⁰⁵ This is certainly the correct response under many circumstances. Some norms are sufficiently important and entrenched that their violation should not be tolerated. Moreover, the avarice of some people means that a certain level of property crime will persist, no matter how just society's wealth distribution. Much of the conduct that contributes to such background levels of crime is typically unjustified and is unlikely to convey much useful information. Nevertheless, our analysis counsels against the common knee-jerk tendency toward ever higher penalties and instead encourages lawmakers to consider the possibility that spikes or concentrations of property lawbreaking may, at times, provide a reason to reevaluate society's commitment to property law's status quo. Extremely high penalties, combined with the unpredictability of the criminal justice system, can make the cost of engaging in even justified outlaw conduct too high for most peo-

³⁰² In California, for example, petty theft can be punished as a felony if the defendant has a prior conviction for the crime, and any felony (including such elevated "petty theft" convictions) can count as a third strike. See *Lockyer v. Andrade*, 538 U.S. 63 (2003). In the *Andrade* case, the defendant, who had a history of committing property and drug crimes, was sentenced to twenty-five years to life in prison after being caught attempting to steal videotapes valued at roughly \$150. *Id.* at 66-67 (describing Andrade's offense and punishment level).

³⁰³ See Kahan, *supra* note 237, at 377-82.

³⁰⁴ See *id.* at 382 (presenting certainty of enforcement and severity of punishment as components of an optimal-balance model).

³⁰⁵ See ZIMRING & HAWKINS, *supra* note 229, at 221.

ple.³⁰⁶ While they may prevent crime, high penalties can stifle the democratic deliberation generated by property lawbreaking—deliberation that is essential to property's evolutionary dynamism.

The social influence approach of increased law enforcement, which advocates an engagement with both the “price” of crime and its social meaning, presents more of a puzzle for our analysis.³⁰⁷ Proponents of this school of thought often favor a higher certainty/lower penalty strategy of criminal punishment.³⁰⁸ Our analysis lines up with the prescriptions of the social influence theory, at least to an extent,³⁰⁹ but we are also cognizant of the potential chilling effect on justified lawbreaking of frequent, albeit low-level, punishment endorsed by the high certainty/low penalty strategy. A proper concern with the importance of permitting some leeway for productive and justified lawbreaking suggests the need to retain a degree of flexibility within strategies aimed at aggressively eliminating disorder; in some cases even counseling in favor of justifying intentional underenforcement.

While we believe that property outlaws are sometimes justified in their conduct and can offer society valuable information about inefficiencies or injustices in the property system, the unlawful nature of their behavior *is* cause for concern. In part, this concern stems from the likely uneven and potentially unfair effects of outlaw behavior on property owners and third parties. If legal reform is left to the individual actions of property outlaws, it is unlikely that the losses imposed on property owners will be fairly distributed. Because criminals typically operate in their own neighborhoods, the result might be actions by property outlaws that perversely make the situation of the poor as a whole even worse.

In part, however, this concern also stems from the dangers that criminal behavior poses to the well-being of outlaws themselves. By engaging in illegal behavior, even if justified, property outlaws take substantial risks. In light of the potential that property owners and their sympathizers will engage in violent self-help, they risk their physical safety. In addition, they risk being burdened by substantial fines,

³⁰⁶ See Polinsky & Shavell, *supra* note 218, at 880-81, 884-85 (noting the potential unfairness of fining individuals “far in excess of the external cost they impose on society”).

³⁰⁷ See generally Kahan, *supra* note 237, at 349-52 (presenting the “social influence” theory of deterrence).

³⁰⁸ See *id.* at 379 (indicating that a “high-certainty/low-severity strategy . . . is more likely to generate a low crime-rate equilibrium”).

³⁰⁹ See *id.* at 382.

imprisonment, or social stigma. While their actions may be useful in highlighting areas of needed legal reform, it would be wrong to conclude that the existence of property outlaws (that is, of people whose interests are so ignored by the lawmaking process that they view law-breaking as the surest way to satisfy their needs) is a matter of indifference.

A concern with both the unfair potential burdens on property owners and on property outlaws themselves suggests that lawmakers should aim to limit resort to criminal conduct as a tool of legal evolution to those situations in which it seems most clearly justified. Moreover, they should favor the affirmative creation of effective alternative means for potential outlaws to express opposition to the legal status quo. With these qualifications in mind, we divide our suggested legal responses to outlaw behavior into two categories of paired alternatives, each category corresponding to one of the two principal values we view as being created by property outlaws. Viewing outlaws' redistributive and informational value through the bifurcated lens of outlaw actions and possible alternatives to such actions yields four possible strategies (apart from merely increasing repression). In response to outlaws' redistributive value, the state may either (a) ratify outlaws' forced transfers, or (b) increase systems of government-sponsored redistribution. In response to outlaws' information value, the state may either (a) incorporate the information generated by outlaw behavior into the political process through deliberative feedback mechanisms, or (b) increase subsidies of noncriminal substitutes to outlaw behavior.

Each of these pairs represents a set of (admittedly imperfect) substitutes. Increased governmental redistribution will tend to reduce the need for reliance on forced transfers and on expensive and unreliable procedural mechanisms for weighing the justifications for such transfers after the fact.³¹⁰ Similarly, increased subsidization of speech that is subversive of the status quo reduces the pressure to engage in illegal expressive conduct to draw attention to groups' complaints. Conversely, however, in the absence of the state's willingness to create and adequately fund viable alternatives to outlaw conduct, we can ex-

³¹⁰ See WALDRON, *supra* note 257, at 244-45 (noting that the "welfare state is a way of ensuring that no one should ever be in such abject need that he would be driven to violate otherwise enforceable rules of property").

pect continued or increased reliance on lawbreaking.³¹¹ These two strategies, however, are not mutually exclusive.

1. Responding to Property Outlaws' Redistributive Value

a. *Ratifying Certain Forced Transfers*

When confronted with acquisitive property outlaws, one option available to the legal system is to ratify their acquisitive action by granting the outlaw title to the property. To a limited extent, the law already ratifies a number of forced transfers through the doctrines of adverse possession and necessity. These two doctrines, however, have failed to keep pace with changes in the technology of property enforcement and with our society's expanding definition of needs, the consequence of which has been an artificial narrowing of their application.

i. Adverse Possession

The doctrine of adverse possession permits a trespasser who makes sufficiently open and notorious use of someone else's property for a specified period of time to obtain title ownership to that land.³¹² In most cases, state law permits even the knowing trespasser (or so-called "bad faith" adverse possessor) to take advantage of this doctrine.³¹³ Although not a criminal law doctrine, adverse possession ultimately converts someone who would otherwise qualify as a criminal trespasser into an owner.

Lee Fennell has called bad faith adverse possession a case of "efficient trespass,"³¹⁴ but "efficient theft" would be a better term. The end result of adverse possession is not merely permission to continue trespassing on another's property without being able to exclude the true owner herself, as one would expect from a theory of efficient trespass. Nor is it merely an option to purchase the property through the reduction of the owner's protection from a property rule to a liability rule. Instead, the result of successful adverse possession is an outright involuntary transfer of property rule protection, in the form

³¹¹ See FRANCES FOX PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR* 4-6, 33-41 (1993) (suggesting that the relief system reinforces market incentives).

³¹² 3 AM. JUR. 2D *Adverse Possession* § 10 (2002).

³¹³ See *supra* note 61 and accompanying text.

³¹⁴ Fennell, *supra* note 219, at 1038.

of fee simple ownership, from the true owner to the unlawful possessor.

Under certain circumstances, a forced transfer can be justified in utilitarian terms, as we have already observed. And, as Fennell has persuasively argued, the broad contours of adverse possession law seem to be well crafted to isolate a category of situations in which we can have a great deal of confidence that such transfers are efficient. But the doctrine can also be justified in nonutilitarian terms. The intentional adverse possessor, or squatter, has typically been someone without much property but with a great deal of time and a willingness to invest substantial labor in improving the unoccupied property of another. In addition, she seeks to put the property in question (real estate) to valuable use, either for the provision of the shelter or to pursue her livelihood. Finally, the property must be sufficiently unimportant to its owner that she permits an interloper to intrude on her property and occupy it for a lengthy period of time, typically seven to ten years.

One could justify the legal ratification of intentional adverse possession by applying something like the nonutilitarian principle we have previously discussed in relation to the retributive response to acquisitive outlaws: it is not wrong to appropriate someone else's surplus property in order to provide for one's own need when viable legal alternatives are not available. The application of this nonconsequentialist principle would seem to track fairly closely the acquisitive outlaw behavior most strongly justified by utilitarian theory. This principle, of course, generates substantial epistemological problems when it comes to determining whether its conditions are actually satisfied. Adverse possession gets around these problems by adopting onerous conditions that ensure its application will be radically underinclusive.

It is true that the adverse possession doctrine does not on its face pay much attention to the "need" of the adverse possessor, but when applied to the bad faith adverse possessor, that need will very likely be manifest. With the exception of boundary disputes, it seems unlikely that many of the property-rich will have either the time or inclination to intentionally adversely possess someone else's land. And the status of the property in question as "surplus" property of the true owner is also likely to be satisfied when the owner cannot be troubled to assert her property rights within the prescribed period of time.

In the past, the doctrine of adverse possession has served a fairly important redistributive function and constituted a significant threat

to absentee ownership.³¹⁵ Its significance in recent years, however, has declined to such an extent that it is now plausibly described as merely a mechanism for clearing titling errors and resolving inconsequential border disputes.³¹⁶ This diminished role for adverse possession is the natural result of reductions in the cost of property surveillance that make it cheaper for property owners to oust potential adverse possessors and, consequently, diminish the incentives for potential adverse possessors to seek out property to possess in the first place. All things being equal, improvements in the technology for enforcing property rights make the category of adverse possession even more radically underinclusive than it would already otherwise be. Owners need not expend much energy monitoring their property, and prospective squatters are confronted with a miniscule likelihood of successfully obtaining title.

These observations suggest that, as the technology of property monitoring has improved, property law should have responded by easing the requirements for adverse possession. Because the behavioral requirements of adverse possession continue to serve the purpose of putting reasonably attentive owners on notice that their property is occupied by another, the most straightforward way to respond to the technological advances in property surveillance would be simply to reduce the period of time for which the adverse possessor must possess the property. Although seven years may have been a fair period of time to require of an adverse possessor in the nineteenth-century west, when a trip from the east to the west coast and back could take months, one to two years would seem to be more than sufficient to protect the interests of even moderately vigilant property owners in this era of six-hour transcontinental flights and telecommunication. The case for such a reduction in the time period required for adverse possession seems particularly strong in the context of urban properties, where it is virtually impossible for even the most careless owner not to notice an adverse possessor's use of her land.³¹⁷

³¹⁵ See, e.g., Cohen, *supra* note 48, at 201-04 (describing title defects stemming from adverse possession in land owned by a prominent absentee landlord in the nineteenth century).

³¹⁶ See KEVIN GRAY & SUSAN FRANCIS GRAY, *ELEMENTS OF LAND LAW* § 6.39, at 372 (4th ed. 2005) ("Statistically the most significant adverse possessor is one who claims that a minute sliver of land formally titled in his neighbour has been inaccurately fenced in his own favour or has been the subject of a mistaken double conveyance to himself.").

³¹⁷ It almost goes without saying that the position we advocate in this paper is inconsistent with a recent and much-noted decision of the European Court of Human

ii. Necessity

The doctrine of necessity permits nonowners to trespass on, and under certain circumstances even to appropriate, the property of others in order to avoid a grave harm.³¹⁸ In the criminal context, the basic insight of the doctrine, which is recognized in nearly every state and federal court in the country, is that a person should not be punished for being forced by circumstance to choose between two evils, the lesser of which involves breaking the law.³¹⁹ Although it varies significantly by jurisdiction, the criminal defense of necessity has traditionally been understood to justify the defendant's otherwise unlawful appropriation of the property of another when (1) the defendant's illegal conduct was committed to avoid a significant evil; (2) the defendant reasonably believed that her actions were necessary to avoid this evil; (3) the defendant had no alternative legal means of preventing this harm; and (4) the evil sought to be avoided is greater than the harm expected to result from the defendant's criminal conduct.³²⁰

This doctrine can be fairly easily justified in utilitarian terms. But it can also be explained in terms similar to the nonconsequentialist, redistributive principle we have been discussing. Like adverse possession, however, the doctrine of necessity creates substantial epistemological problems, to which the law has responded by couching the doctrine in qualifications that end up making it profoundly underinclusive.³²¹

Rights, holding that the operation of U.K. adverse possession law (in a case involving "bad faith" adverse possession) violated the rights of property owners. *See* J.A. Pye (Oxford) Ltd. v. United Kingdom, App. No. 44302/02, slip op. (Eur. Ct. H.R. Nov. 15, 2005) (on file with authors). Nevertheless, that decision is fundamentally correct in its rejection of the nonredistributive justifications offered for the radical consequences of adverse possession. Explanations based on adverse possession's tendency, for example, to clear uncertain title simply fail to explain the actual operation of the doctrine under circumstances, such as those in *Pye*, in which there is no uncertainty as to title.

³¹⁸ *See generally* EPSTEIN, *supra* note 219, at 98-100 (illustrating the effect of private necessity on ownership rights); Smith, *supra* note 234, at 89-91 (describing "the right of one facing necessity" as a situation in which it would make sense to "delineate a stand-alone right to engage in self-help").

³¹⁹ *See* Shaun P. Martin, *The Radical Necessity Defense*, 73 U. CIN. L. REV. 1527, 1532 (2005) ("The necessity defense . . . has long been a part of Anglo-American jurisprudence."). *But see* 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 124(a), at 45 (1984) (stating that only half of American jurisdictions recognize the necessity defense).

³²⁰ Martin, *supra* note 319, at 1535-36.

³²¹ *See id.* at 1567-89 (describing the requirements for the necessity doctrine to apply: imminence, causation, and the absence of legal alternatives).

In its traditional formulation, necessity doctrine falls squarely within the circumstances that approximate those in which we have argued that acquisitive outlaw behavior would be justified: situations in which someone in need nonviolently takes what he needs from the surplus (or, to use Aquinas's formula, "superabundance") of another. The conduct of many squatters, both those of the nineteenth-century American West and in many parts of the developing world today, as well as those in the modern urban context, would appear to fall within the boundaries of this defense. In addition, many of the behaviors of homeless people that have been criminalized by local governments in recent years fit comfortably within this broader understanding of the doctrine of necessity.³²² Our analysis suggests not only that such conduct should be immune from sanction but that efforts to interfere with behavior necessary for survival, such as panhandling and sleeping in public, may well give rise to a civil remedy.³²³

Many courts, however, have interpreted the necessity defense in an artificially narrow way that would restrict it to extremely unusual circumstances, such as natural disasters. Several courts, for example, have held that, as a categorical matter, the doctrine is not available when the evil the defendant seeks to avoid is caused by economic forces alone.³²⁴ Our analysis rejects these narrow reconstructions of the defense and would require courts to treat economic necessity in precisely the same way that they treat necessity caused by natural dis-

³²² See Maria Foscarinis, *Downward Spiral: Homelessness and Its Criminalization*, 14 YALE L. & POL'Y REV. 1, 16-26 (1996) (discussing cities' efforts to criminalize survival behavior by the homeless).

³²³ See, e.g., *Ploof v. Putnam*, 71 A. 188, 188-89 (Vt. 1908) (allowing a cause of action against a dock owner whose servant unmoored a boat that had docked in an emergency, resulting in injuries to those in the boat); EPSTEIN, *supra* note 219, at 98-100 ("The owner who casts away the stranger in need can be sued for the harm that follows . . ."). This does not necessarily mean that governments cannot seek to relocate such behavior. See Ellickson, *supra* note 237, at 1219-26 (describing potential zoning laws a city could use to restrict panhandling to certain areas). But if those restrictions have the effect of making it too difficult (or impossible) for the homeless to satisfy their needs, the necessity doctrine would justify their violation.

³²⁴ See, e.g., *State v. Gann*, 244 N.W.2d 746, 752-53 (N.D. 1976) (rejecting an argument based on economic duress); *Harris v. State*, 486 S.W.2d 573, 574 (Tex. Crim. App. 1972) ("Economic necessity is no justification for a positive criminal offense."); *State v. Moe*, 24 P.2d 638, 640 (Wash. 1933) ("Economic necessity has never been accepted as a defense to a criminal charge."); see also Martin, *supra* note 319, at 1588 (stating that "several courts" have held that the necessity doctrine cannot be invoked when the harm is economic, and citing cases in support); Michelle Conde, Comment, *Necessity Defined: A New Role in the Criminal Defense System*, 29 UCLA L. REV. 409, 421-22 (1981) (describing as a rationale for limiting the necessity defense the fear that permitting it encourages others to engage in similar unlawful conduct).

ters. In a predominantly market-based economy that relies almost exclusively upon consensual transactions to get property from one person to another, economic necessity can be as dire an evil as catastrophic flooding.³²⁵ Moreover, as in the case of natural disasters, third parties who assist those in situations of necessity should also be entitled to take advantage of the defense.³²⁶

In one Texas case, for example, a woman was charged with welfare fraud when she made false statements about her income while trying to obtain welfare assistance.³²⁷ The woman had unlawfully obtained work while receiving welfare benefits in order to supplement her welfare income to provide food for her children. Her lawyer proffered the testimony of several experts to the effect that the defendant's children were suffering from malnutrition prior to her attempt to supplement her income and that the state welfare benefits available to the defendant were inadequate to provide for herself and her children.³²⁸ The trial court refused to allow the defendant to present the evidence to the jury, and the defendant was convicted.³²⁹

In *Southwark v. Williams*,³³⁰ a 1971 case involving urban squatters in London, the court endorsed an equally narrow interpretation of the necessity doctrine. The case involved homeless families that had been living on the streets of London and that had, with the assistance of an urban squatting advocacy group, nonviolently occupied an abandoned home that was owned by the Borough of Southwark. When the Borough brought suit to oust them from possession, the defendants pled the defense of necessity. The court categorically rejected the defense's applicability, arguing in sweeping terms that necessity could

³²⁵ See, e.g., *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1564 (S.D. Fla. 1992) ("An individual who loses his home as a result of economic hard times or physical or mental illness exercises no more control over these events than he would over a natural disaster."); see also RYAN, *supra* note 267, at 297-98 (quoting approvingly the Comte de Mun, who stated that the laborer is exploited and not completely free "in a regime which puts [her] life at the mercy of supply and demand").

³²⁶ The argument on behalf of the right of third parties to intervene appears to follow from the logic of the necessity defense. And, indeed, Aquinas argued in favor of the justification of such intervention. See AQUINAS, *supra* note 254, at II-II, at Q. 66, art. 7 ("In a case of a like need, a man may also take secretly another's property in order to succor his neighbor in need.").

³²⁷ *Mayfield v. State*, 585 S.W.2d 693 (Tex. Crim. App. 1979); see also J. Thomas Sullivan, *The Defense of Necessity in Texas: Legislative Invention Comes of Age*, 16 HOUS. L. REV. 333, 346-47 (1979) (summarizing *Mayfield*).

³²⁸ *Sullivan*, *supra* note 323, at 346-47.

³²⁹ *Id.*

³³⁰ (1971) 2 Eng. Rep. 175 (A.C.).

never be used outside the context of imminent threats to physical safety caused by environmental calamities and the like: “[W]hen a man, who is starving, enters a house and takes food in order to keep himself alive[, our] English law does not admit the defense of necessity. It holds him guilty of larceny.”³³¹ The court’s justification rested entirely on the long-term spillover effects of a broad necessity defense on public order and the security of property. “If homelessness were once admitted as a defense to trespass,” the court implausibly argued, “no one’s house could be safe.”³³²

The court’s concern for the security of homeownership was needlessly alarmist in the context of a case about homeless urban families occupying abandoned and derelict housing. There is no reason why the necessity doctrine cannot be tailored to steer its beneficiaries toward underutilized, abandoned, or other obviously neglected property. Nevertheless, the court’s concern with long-term consequences flowing from a broad definition of necessity is a reasonable one.

The negative spillover effects of recognizing such a defense, however, would be limited by the fact that few criminal cases go to trial. Even for those that do, necessity would, for the most part, be defined only after the fact by a jury (or judge) whose decision is not binding on future courts or juries.³³³ Moreover, in a society in which most people perceive the system of social welfare to be adequate to provide for the needs of the poor, few factfinders would be willing to conclude that acquisitive outlaw conduct was justified in any but the most extreme circumstances. While permitting a greater number of defendants to argue the necessity defense would marginally raise the cost of law enforcement and might yield a slightly lower conviction rate for

³³¹ *Id.* at 744.

³³² *Id.*

³³³ Under certain circumstances, or even in entire categories of cases, dire need might be so clear as to justify a judge in granting prospective injunctive relief or determining that enforcement of a particular law would, as a matter of law, violate the principle of necessity. A similar intuition may lie behind the conclusions of some courts that the enforcement of laws prohibiting unavoidable behavior by the homeless, such as sitting or sleeping in public, constitutes cruel and unusual punishment in violation of the Eighth Amendment. *See, e.g.,* *Jones v. City of Los Angeles*, 444 F.3d 1118, 1136 (9th Cir. 2006) (“[E]nforcement of section 41.18(d) at all times and in all places against homeless individuals who are sitting, lying, or sleeping in Los Angeles’s Skid Row because they cannot obtain shelter violates the Cruel and Unusual Punishment Clause.”); *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1564 (S.D. Fla. 1992) (“[A]rresting the homeless for harmless, involuntary, life-sustaining acts such as sleeping, sitting, or eating in public is cruel and unusual.”).

property crimes, it is unlikely that these effects would encourage many people to undertake additional criminal actions.

The impact of broadened consideration of necessity by juries could be diminished even further if the defense were styled as an excuse or mitigation, rather than as a justification. Characterizing arguments beyond the traditionally narrow limits of the necessity doctrine—as excuses or as factors to consider in mitigation of the prescribed punishment, rather than outright justifications—would soften the impact of the shift we are proposing. It would permit judges and juries to view the role that economic need played in the defendant's decision to violate the law outside of the confines of the traditional necessity defense without confining their options to the binary choice of conviction or exoneration.

Obviously, the jury is a less than perfect mechanism for democratic feedback. Juries are small and are usually not representative of the electorate as a whole. Nevertheless, they are the only direct point of involvement by citizens within the criminal process. Juries have therefore almost always played crucial roles in bottom-up lawmaking.³³⁴

To be clear, we have no illusions that the jury process constitutes an ideal mechanism for disseminating information to the broader political community. The feedback between the jury and the democratic process, for example, cannot work when the jury system is itself fatally flawed or reflects unbridgeable cleavages within the polity. When a segment of the population is excluded from the jury, as was the case in the Jim Crow South, juries simply cannot function as a stand-in for the conscience of the community or as a means of filtering information back into the political process. Similarly, when a segment of the community is excluded from the political process, or when a political community is so segmented by class or race that there is an utter lack of basic respect for certain members of the community, the jury mechanism for feeding information back into the political process will

³³⁴ See KRAMER, *supra* note 10, at 29 (“The jury’s power to address issues of fundamental law . . . reflects and manifests . . . what we might call ‘popular law.’”); Michael Kozura, *We Stood Our Ground: Anthracite Miners and Expropriation of Corporate Property, 1930-41*, in “WE ARE ALL LEADERS”: THE ALTERNATIVE UNIONISM OF THE EARLY 1930S, at 199, 215 (Staughton Lynd, ed., 1996) (discussing how juries “composed of friends and neighbors” aligned themselves with miners and unions to make “the cost of legal repression prohibitive for coal companies”); Jim Pope, *Worker Lawmaking, Sit-Down Strikes, and the Shaping of American Industrial Relations, 1935-1958*, 24 LAW & HIST. REV. 45, 84 (2006) (describing how a deadlocked jury resulted in dropped charges against sit-down strikers).

be impaired. But as long as the jury system operates in a relatively nondiscriminatory manner and the society is not already irreparably riven by racial or class divisions, broadening the use of the necessity defense might provide destitute defendants with a meaningful opportunity to explain the motivations for their conduct and provide jurors with important insights into the challenges or hardships faced by the poorest members of society—insights that they can then disseminate to the larger political community.

Robert Ellickson reasonably questions the educative value of brief encounters with the poor, such as the typical fleeting interaction with panhandlers on the street.³³⁵ But in the context of a protracted interaction, like a criminal trial, it is plausible to think that exposure to the hardships faced by the poorest citizens could help to educate the jury, as well as any public or press who might be attending the trial, about the contours of economic injustice, thereby feeding useful information back into the democratic political process.³³⁶ Additionally, a large number of acquittals under the defense would provide a powerful signal to the relevant authorities that something was badly wrong with public perceptions of the fairness of the jurisdiction's system of social insurance for the poor.

³³⁵ Ellickson, *supra* note 237, at 1230 (citing George Wilson, *Exposure to Panhandling and Beliefs About Poverty Causation*, 76 SOC. & SOC. RES. 14, 16 (1991)). Although Ellickson's skepticism is plainly reasonable, the particular study on which he relies is deeply flawed. In the study, the author conducted a simple phone survey of 100 lower-income, white residents of Baltimore in which respondents were asked (1) the frequency of their exposure to panhandling during the prior year; (2) the location of that exposure; and (3) their beliefs regarding the reasons for poverty. Wilson, *supra*, at 15. The study's author found a correlation between the number of times respondents reported being approached by panhandlers and their adherence to individualistic beliefs about causes of poverty. *See id.* The study's design, however, is obviously unable to support the author's strong conclusion that "[f]or Baltimore respondents, more frequent contact with panhandlers serves to create negative and unsympathetic attitudes towards their economic plight." *Id.* at 16. For instance, the survey's reliance on self-reporting of contacts by panhandlers over the period of an entire year likely led to a bias within the study's results, since those already predisposed to view panhandlers as a nuisance (who are poor because of their own shortcomings) may also have been prone to overstate the number of times they had been approached by panhandlers over such a lengthy period of time. Moreover, the author's unexplained decision to rely exclusively on lower-income white respondents introduces a potential racial bias into the study of panhandling in a city with a history of racial tension, where two-thirds of the residents (and many of its poorest citizens) were (and are) black.

³³⁶ *See* Kenneth W. Simons, *Exploring the Intricacies of the Lesser Evils Defense*, 24 L. & PHIL. 645, 677 (2005) (arguing that trial factfinders are better equipped than legislatures to determine when the "lesser evils defense" should be accepted, since they are "appropriately sensitive to [the] special circumstances" underlying specific cases).

b. *Increasing Government-Sponsored Redistribution*

Of perhaps greater concern than the long-term effects on law and order is the cumulative effect of justified acquisitive outlaw conduct on certain property owners. It is impossible to predict with any certainty to what extent the costs imposed on property owners by concentrated outlaw conduct would lead to further deterioration of economic activity in areas of concentrated poverty. If the consequences were extensive, however, they would further harm those living in economically depressed communities. Whether these long-term costs exceeded the net benefits of the forced transfers would depend on the degree of need satisfied by the transaction. Of course, for nonutilitarians, those costs would be irrelevant to the inquiry whether the acquisitive outlaw was herself justified in taking the property to satisfy her needs. Nevertheless, even the nonconsequentialist would have reason to favor an effort to provide for the justified needs of the poor through the most efficient means possible.

Compensation or other risk-spreading mechanisms for property owners impacted by justified self-help might work to cabin negative side effects. Greg Alexander, for example, discusses *Modderklip East Squatters v. Modderklip Boerdery (Pty) Ltd.*,³³⁷ a South African Constitutional Court case considering how to treat 40,000 squatters who had illegally occupied property owned by a Johannesburg farmer.³³⁸ The Court refused to compel the squatters to leave the land they had taken, but, acknowledging the unfairness of the burden they had imposed on the landowner, commanded the government to compensate the landowner for his losses.³³⁹ The judgment recognized the legitimacy of each party's claims: the squatters' claim to land on which to live, and the landowners' claim not to be forced to bear the entire cost of honoring the squatters' legitimate claims. In effect, it concluded that both parties' rights had been violated by *the State's* failure to adequately address the country's maldistribution of land, and it crafted a remedy that mimicked as closely as possible the benefits of a centralized solution to the problem. As Andre Van der Walt put it, this remedy treats the state's "failure to protect one right (access to housing)

³³⁷ 2004 (8) BCLR 821 (SCA).

³³⁸ GREGORY S. ALEXANDER, THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE 192-96 (2006); Andre J. van der Walt, *The State's Duty To Protect Property Owners v. The State's Duty To Provide Housing: Thoughts on the Modderklip Case* (2006) (unpublished manuscript, on file with authors).

³³⁹ ALEXANDER, *supra* note 338, at 192-96.

as the direct cause of failure to protect the other right (property) [I]f the one right was protected properly, the other one could have been protected as well.”³⁴⁰ In other words, the South African Supreme Court’s decision perfectly illustrates the interdependence between owner and nonowner that lies at the heart of the phenomenon we are describing.

In the end, the costs associated with self-help suggest that it would usually be far cheaper for society to provide for the needs of the poor in a more organized and proactive fashion. A comprehensive system of government-sponsored redistribution and social insurance is an obvious substitute for the sorts of self-help redistribution envisioned by doctrines like adverse possession and necessity, and would generate far fewer spillover effects.³⁴¹ But it is important to note (although scholars sometimes seem to overlook³⁴²) that, although a system of voluntary or mandatory redistribution may be *more* efficient than distributive-minded changes in property law, it does not follow that self-help is inferior to a highly unequal status quo, and therefore not justified, when, for whatever reason, adequate redistribution does not appear likely to be forthcoming.

As a society expands its formalized systems of redistribution, we should expect that its members will rely less and less on acquisitive outlaw behavior. Nevertheless, the status quo biases operative within the property system resist the expansion of such redistributive systems, and, as Markovits argues, the democratic political process itself generates its own inefficiencies that prevent redistributive programs from being kept up to date. Accordingly, it seems likely that even in societies that make substantial efforts to provide adequate social safety nets, movements of acquisitive (and intersectional) property outlaws will crop up from time to time to prod the process along.³⁴³

An example of the natural interplay between these two strategies of redistribution is provided by the homeless. The services currently

³⁴⁰ Van der Walt, *supra* note 338, at 18.

³⁴¹ See generally Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 667 (1994) (arguing that “redistribution through legal rules offers no advantage over redistribution through the income tax and typically is less efficient”).

³⁴² See, e.g., Ellickson, *supra* note 237, at 1190 (“Lawmakers would be unwise to abandon otherwise appropriate rules-of-the-road simply to provide aid to street people. If redistribution is to be carried out, families, charities, and welfare agencies know far more than judges about who is deserving of aid. Judges should rebuff advocates’ efforts to sacrifice street law on the altar of income redistribution.”).

³⁴³ See, e.g., PIVEN & CLOWARD, *supra* note 311, at 4-6, 33-41.

available to the homeless are viewed by many to be inadequate to provide for even their most basic needs.³⁴⁴ In addition, because of their uniquely challenging circumstances, the homeless find it very difficult to take advantage of those social services that are provided by the state and by private actors.³⁴⁵ Accordingly, they frequently find themselves forced to resort to informal (and increasingly, illegal) mechanisms of providing for their needs, such as illegal begging and trespass.

Surveys of public opinion indicate that citizens generally believe that the resources available to the homeless are inadequate and should be expanded.³⁴⁶ Members of the public also appear to believe that the criminal law should not penalize the homeless for taking actions necessary for survival.³⁴⁷ Availability of the necessity defense to the homeless who nonviolently break laws against trespass, theft, or panhandling might well result in a substantial number of acquittals.³⁴⁸ If, however, the services made available to the homeless were plainly adequate, as some have argued, the public would likely be unsympathetic toward those homeless who continued to prefer illegal means to satisfy their needs. Broader availability of arguments under the necessity defense, therefore, need not be a harbinger of chaos or the collapse of private ownership, as the *Williams* court feared.³⁴⁹

2. Responding to Property Outlaws' Informational Value

Because willingness to break the law is endogenous to the system of criminal punishment, ratifying forced transfers, *ex ante*, in order to

³⁴⁴ See NAT'L COALITION FOR THE HOMELESS & NAT'L CTR. ON HOMELESSNESS & POVERTY, A DREAM DENIED: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 8 (2006) ("In the 24 cities surveyed in the U.S. Conference of Mayors Hunger and Homelessness Survey for 2005, an average of fourteen percent of overall emergency shelter requests went unmet, with thirty-two percent of shelter requests by homeless families unmet."); Foscarinis, *supra* note 322, at 13-16 (describing the "discrepancy between need and resources" in many cities, as well as the dearth of "[r]esources that could provide long-term solutions to homelessness").

³⁴⁵ See Foscarinis, *supra* note 322, at 15 ("[H]omelessness itself creates additional barriers to long-term aid: without a permanent address, telephone, and transportation, finding housing and employment . . . is extremely difficult . . . [and] it may also be difficult or impossible to apply for and receive public assistance benefits . . .").

³⁴⁶ See *id.* at 51-52.

³⁴⁷ See *id.* at 53.

³⁴⁸ Note, however, that if these factual assertions were inaccurate, the mechanism we advocate would be largely self-correcting.

³⁴⁹ See *Southwark v. Williams*, 2 Eng. Rep. 175, 179 (A.C. 1971) ("Necessity would open a door which no man could shut . . . There would be [those] who would imagine that they were in need, or would invent a need, so as to gain entry.").

accommodate certain categories of lawbreakers is likely to have some effect on the value of the information communicated by lawbreaking. Deterrence theories of punishment (and common sense) suggest that making the perceived punishment for crime less certain or less severe will itself increase to some extent the likelihood that people will be willing to break the law.³⁵⁰ Moreover, excusing, *ex ante*, certain categories of lawbreaking is likely to generate strategic behavior on the part of lawbreakers that may well blur the boundaries distinguishing justified from unjustified outlaw behavior. The trick is to avoid completely foreclosing certain types of productive lawbreaking without encouraging broader criminal behavior to such a degree that the informational value of productive lawbreaking is itself destroyed. The task, therefore, is to preserve the expressive and communicative value of the lawbreaking in such a way that it (1) reduces spillover effects and (2) avoids diluting the message, but (3) still provides an adequate level of deterrence against other, less productive forms of criminality. The law can accomplish this by selectively awarding a combination of case-specific immunities and particularized reductions of sentences, all of which can help preserve informational value without necessarily blurring the boundaries between productive and unproductive lawbreaking.

However, it is very difficult to specify in advance in general terms the content of the category of justified property lawbreaking with any precision. It is far easier to judge the justification of such actions on a case-by-case basis after the fact. Accordingly, most of the legal responses that we advocate in this Part focus on *ex post* evaluations, often discretionary and nonprecedential in nature, that permit government decision makers to take into account the full complexity of the circumstances in determining how, or whether, to punish a particular act of lawbreaking.

The use of *ex post* mechanisms that operate on a case-by-case basis has two benefits. First, they are the sorts of mechanisms best suited to the moral complexity involved in outlaw conduct. Second, because deterrence operates on the *expected* sanctions of potential criminals, the case-by-case operation of the reforms we suggest limits their po-

³⁵⁰ But only to some extent. As already discussed, this deterrent mechanism operates most forcefully with respect to a small subset of the population, which is assumed to be generally law-abiding. See *supra* notes 223-226 and accompanying text. Moreover, as theorists have noted, minor changes in the extent or likelihood of criminal sanctions are unlikely to have an appreciable effect on crime rates. See ZIMRING & HAWKINS, *supra* note 229, at 195.

tential long-term effects for those contemplating future criminal acts. The general deterrent effect of building an *ex ante* exception into laws of theft and trespass is likely to be more substantial than that caused by granting after the fact case-by-case relief from criminal sanctions for defendants whose conduct happens to satisfy the requirements for, say, a necessity defense.³⁵¹ The use of such *ex post* remedies therefore largely preserves the informational value of protracted outlaw conduct.

These mechanisms are not without their shortcomings, however. Giving broad discretion to public officials presents the danger of abuse and partiality in its exercise. Moreover, the case-by-case adjudicative method of relief has difficulty taking into account relevant consequences that flow from the aggregation of decisions in individual cases. On the other hand, much of the discretion for which we advocate already exists, but may not be exercised along the lines we are suggesting. Consequently, our proposals would not do much to make the existing state of affairs worse. And, as we have argued, the *ex post* strategies we are recommending help to minimize long-term costs. Moreover, even where the legislature is better situated to take into account the implications of an emerging pattern of lawbreaking, case-by-case adjudication can help to draw the legislature's attention to the problem in the first place. For example, in the Netherlands a judicial decision in favor of urban squatters generated a firestorm of controversy that led to the enactment of a law prohibiting property owners from keeping their property vacant or unused for long periods of time.³⁵²

³⁵¹ This would remain true unless (1) *ex post* relief were granted in an appreciable number of cases and (2) the substantial likelihood that they would be able successfully to take advantage of such *ex post* relief were communicated to potential criminals. *Cf.* ZIMRING & HAWKINS, *supra* note 229, at 195-96 (observing that knowledge by potential criminals of the extent and likelihood of sanctions, and of changes in sanctions, is necessary for punishment to have a deterrent effect, and noting the low level of public awareness regarding the prescribed sanctions for particular crimes). This circumstance does not seem especially likely to occur.

³⁵² See Andre J. Van der Walt, *Exclusivity of Ownership, Security of Tenure, and Eviction Orders*, Pt. II.b (2006) (unpublished manuscript on file with authors).

a. *Engaging Property Outlaws*

i. Expressive Necessity

While we favor the broad availability of the necessity defense for acquisitive outlaws, our analysis suggests that the necessity defense is somewhat less justifiable in the context of expressive outlaw conduct. And in fact, federal courts in particular have been reluctant to allow civil disobedients to avoid punishment by arguing necessity.³⁵³ Most instances of expressive property lawbreaking, however, involve what is known as “indirect” civil disobedience, in which the law that is expressively broken, such as the law against criminal trespass, is not the law that the protesters are trying to change. This is the case, for example, with protesters who trespass on military bases in order to express their condemnation of nuclear deterrence. But intentional lawbreaking by those we are calling property outlaws aims at protesting the very property law being broken. That was the case, for example, with the 1960s civil rights protesters and the urban squatters of the 1970s and 1980s.³⁵⁴

Application of the doctrine of necessity is more appropriate in situations involving direct civil disobedience. This argument depends on the greater informational value provided by direct civil disobedience. When someone violates a property law to protest some other sort of law, the only information she conveys is the intensity and seriousness of her moral opposition to the law in question. In contrast, when someone violates the very law to which she is opposed, she conveys both her intensity and seriousness, and, in addition, provides a visible example of the alternative state of affairs she hopes to bring about.³⁵⁵ Moreover, while there are a variety of ways to express seriousness and intensity of belief without violating the law, the only way for some nonowners to produce a concrete example of the property regime they seek is by violating the very law holding that reality back. This combination of the informational advantage of direct civil dis-

³⁵³ See Bauer & Eckerstrom, *supra* note 276, at 1173; James L. Cavallaro, Jr., *The Demise of the Political Necessity Defense: Indirect Civil Disobedience and United States v. Schoon*, 81 CAL. L. REV. 351, 351 (1993); Robert F. Schopp, *Verdicts of Conscience: Nullification and Necessity as Jury Responses to Crimes of Conscience*, 69 S. CAL. L. REV. 2039, 2083 (1996).

³⁵⁴ See *supra* notes 77-78 and accompanying text.

³⁵⁵ See *supra* notes 201-202 and accompanying text; see also Gerken, *supra* note 201, at 1754-59 (providing examples of how “decisional” dissenters “offer a real-world example of what their principles would look like in practice”).

obedience and the more effective means of expression it provides may justify widening the range of cases in which defendants may plead necessity.

It might be that the legal status quo is supported by reasons more weighty than sheer inertia or a lack of imagination on the part of the dominant majority. If that is the case, allowing the defendant to assert necessity will not do much harm. It is unlikely that a jury would find the expressive outlaw's conduct to be justified under most circumstances. But if a great number of people come to see the existing state of affairs in a different light as a result of the lawbreaking itself, they may come to view those who first showed us the way as heroes rather than criminals.

ii. Discretionary Relief

In addition to the doctrine of necessity, there are other *ex post*, discretionary, and nonprecedential tools at the disposal of the criminal law. Prosecutorial discretion and sentencing are both areas where legal decision makers could, in cases of clear necessity, exercise their authority in ways that would recognize the legitimacy of the defendant's actions while only minimally undermining the strength of criminal norms. Prosecutorial discretion differs from sentencing, however, in its binary nature, which causes it to operate more like a jury's decision to acquit. Because of this, it should perhaps be reserved for situations in which the merits of the defendant's actions are the clearest.

A related, though less risky, strategy is for judges or the executive to treat subsequent legal reform or social consensus ratifying the property outlaws' conduct as grounds for vacating their convictions and sentences. This is the approach the Supreme Court appears to have taken in cases involving civil rights protesters. In a number of cases,³⁵⁶ the Court vacated the convictions of participants in the lunch counter sit-ins in light of the subsequent enactment of state and federal statutes prohibiting restaurant owners from excluding on the basis of race. As the deeply divided Court stated in *Hamm v. City of Rock Hill*, where the legislature has substituted a "right for a crime," there is

³⁵⁶ See *Hamm v. City of Rock Hill*, 379 U.S. 306, 312 (1965); *Bell v. Maryland*, 378 U.S. 226, 228 (1964).

a strong basis for vacating convictions, even for conduct that occurred before the legal change.³⁵⁷

The majority opinion in *Hamm* does not fully capture the power of the legislative transformation at work in that case. The statutes that shifted the legal landscape were no fortuitous coincidence; they were enacted in direct response to the very lawbreaking for which the defendants before the Court stood convicted. When lawbreakers and legislatures engage in such fruitful dialogue, judges (or executives) are on particularly strong ground in granting relief from criminal liability. Forgiveness of outlaw conduct that the community has come to embrace only marginally reduces the deterrent effect of criminal sanctions for most criminals. In addition, it encourages those who are contemplating the possibility of setting out on an outlaw strategy for legal change to carefully assess the likelihood that they are on the wrong side of history.

Finally, unlike a broader exemption of expressive lawbreaking from criminal liability, this approach would not itself undermine the expressive power even of the outlaw conduct to which it applied. There is substantial truth to the notion that the moral courage of civil disobedience depends upon the willingness of the outlaw to risk (or even welcome) criminal punishment in order to express the depth of her dissent. But selective ex post decisions to exempt certain lawbreakers from criminal punishment would preserve the moral power of the lawbreaking at the moment it occurred (since the lawbreaker had no assurance at the time of the action that her action would fall within the scope of the exemption) while also signaling that, on occasion, such behavior is indeed a legitimate form of political expression.

b. *Subsidizing Alternatives to Outlaw Behavior*

Outlaw strategies are particularly appealing to those who cannot challenge the existing legal regime, whether by amplifying their voice with monetary donations to political actors or through mass media, or by pursuing civil litigation. In the case of expressive outlaws, the public subsidization of criminal defense counsel means that criminal litigation may well constitute a more practicable mechanism for pursuing

³⁵⁷ *Hamm*, 379 U.S. at 314. Justice Black, dissenting in *Hamm*, condemned the judicial excusal of the protesters' "lawless conduct," *id.* at 319 (Black, J., dissenting), and Justice Harlan blasted it as a "revolutionary" perversion of precedent. *Id.* at 324 (Harlan, J., dissenting).

legal change than the civil litigation that is the focus of many discussions of evolution within private law.³⁵⁸

It stands to reason that some of the pressure to engage in outlaw behavior might be reduced by affirmatively creating legal alternatives to expand the voice of the property-poor. Two obvious mechanisms present themselves. First, the state could (as it has in the past) subsidize civil litigation on behalf of the poor. Expanding legal aid for the pursuit of civil complaints might well provide a viable alternative outlet for a significant amount of discontent that would otherwise be directed toward outlaw strategies for legal change. Second, expanded state subsidies for access to the political process or means of mass communication would help to amplify voices that might otherwise go unheeded, perhaps encouraging legal change that would otherwise await the pressure provided by property outlaws. It is unlikely that state subsidization of legal alternatives to outlaw strategies will completely eliminate the important role of property outlaws, but the goals of property outlaws suggest that they will provide adequate substitutes for at least some of that conduct.

CONCLUSION

The intentional violation of property law plays an important, though underexamined, role in the development of property doctrine. The behavior of property outlaws of all sorts provides a particularly effective mechanism by which those who are left out of the system of private ownership can challenge and change that system from the outside. Persistent violation of property laws often provides important and useful information about inefficiency or injustice in the existing distribution or content of property rights. While such intentional lawbreaking is often deployed as a strategy of legal change in a variety of areas, it is particularly effective in the context of property law, within which an emphasis on stability ensures that property doctrine will often fall out of step with the needs of contemporary society. Property scholars should be attentive to the criminal enforcement of property laws and the ways in which that enforcement may unfairly punish or overdeter justified and useful lawbreaking by property outlaws.

³⁵⁸ See *supra* note 18 and accompanying text.